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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. **958**

MARCOS PEREZ JIMENEZ, *Petitioner,*

v.

GUY W. HIXON, United States Marshal, Southern District of Florida, Miami, Division,

and

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Miami, Florida, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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March 28, 1963

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MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Miami, Florida, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Marcos Perez Jimenez, petitioner herein, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered on December 12, 1962.[1]

[1] The respondent Guy W. Hixon is the successor in office, as United States Marshal, to John E. Maguire, named in the caption of the case below. The respondent Manuel Aristeguieta, who had filed the original extradition complaint on behalf of the Venezuelan Government, was permitted to intervene in the habeas corpus proceedings in the District Court and was an appellee before the Court of Appeals below. See Tr. 61.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals dated December 12, 1962, as to which review is sought, is reported at 311 F. 2d 547 and is reprinted in Appendix A hereto, p. 1a, *infra*.

The determinations and order entered on August 23, 1961, by the District Court for the Southern District of Florida, dismissing the petitions for habeas corpus and discharging the orders to show cause, are not reported but are reprinted as Appendix B hereto, p. 29a, *infra*.

The order of commitment in the extradition proceedings dated June 16, 1961, the certification to the Secretary of State dated June 23, 1961, and the certification of evidence to the Secretary of State dated June 23, 1961, all signed and entered by United States District Judge George W. Whitehurst, are unreported; they are reprinted as Appendix C hereto, p. 34a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1962. On March 8, 1963, the Chief Justice of the United States signed an order extending the time for filing this petition to and including March 29, 1963. The jurisdicion of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a Judge of a United States District Court, an Article III tribunal, may constitutionally be invested with jurisdiction, purportedly given by 18 U.S.C. § 3184, to certify to the Secretary of State whether an accused individual is subject to extradition pursuant to a treaty with a foreign government.

2. Whether the alleged financial crimes of a former head of a foreign government, stated to have involved personal financial gain and an "abuse of his office" at a time when he was "charged with responsibility for the administration of public funds, property and contracting authority" in the foreign government, constitute crimes or offenses of a political character, or acts connected with such crimes or offenses, within the meaning of Art. III of the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698.

3. Whether a Judge of the United States District Court for the Southern District of California, assigned to "hold a District Court" in the Southern District of Florida, can entertain and hold hearings on an extradition complaint, filed before him pursuant to 18 U.S.C. § 3184 after the expiration of the period of such assignment.

4. Whether it is consistent with procedural due process requirements, under either the Fifth Amendment or 18 U.S.C. § 3184, for the extradition magistrate to refuse to read all the demanding government's evidence submitted earlier to a magistrate previously assigned to the case and to rely instead on a fact memorandum prepared by counsel for the demanding foreign government.

CONSTITUTIONAL, STATUTORY AND TREATY PROVISIONS INVOLVED

Constitution of the United States, Article III:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Code, Title 18:

§ 3184. Fugitives from foreign country to United States.

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If on such hearing, he deems the evidence sufficient to sustain the charge under the provisions

of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such persons, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

---

§3186. Secretary of State to surrender fugitive

The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged . . . .

Extradition Treaty between the United States and Venezuela, 43 Stat. 1698 (1922):

* * * *

Article II

In accordance with the provisions of this Convention, the persons shall be delivered who shall have been charged with or convicted of any of the following crimes:

* * * *

14. Embezzlement or criminal malversation committed within the jurisdiction of one of the parties by public officers or depositaries, where the amount embezzled exceeds 200 dollars in the United States of America or B. 1,000 in the United States of Venezuela.

* * * *

18. Obtaining money, valuable securities or other property by false pretenses or receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained, where the amount of money or the value of the property so obtained or received exceeds 200 dollars in the United States of America or B. 1,000 in the United States of Venezuela.

* * * *

20. Fraud or breach of trust by a bailee, banker, agent, factor, trustee, executor, administration, guardian, director, or officer of any company or corporation, or by any one in any fiduciary position, where the amount of money or the value of the property misappropriated exceeds 200 dollars in the United States of America or B. 1,000 in the United States of Venezuela.

* * * * *

Article III

The provisions of this Convention shall not import claim of extradition for any crime or offense of a political character, nor for acts connected with such crimes or offenses; and no person surrendered by or to either of the Contracting Parties in virtue of this Convention shall be tried or punished for a political crime or offense. When the offense charged comprises the act either of murder or assassination or of poisoning, either consummated or attempted, the fact that the offense was committed or attempted against the life of the sovereign or head of a foreign state or against the life of any member of his family, shall not be deemed sufficient to sustain that such a crime or offense was of a political character, or was an act connected with crimes or offenses of a political character.

STATEMENT OF THE CASE

The record in this habeas corpus case is voluminous, comprising 16 volumes and 4742 pages exclusive of the proceedings in the Court of Appeals. Included in that record are all the relevant portions of the earlier extradition hearings. For present purposes, the following summary may be made of the relevant facts:

A. The Background Facts

1. Marcos Perez Jimenez, the petitioner herein, served as Provisional President of the Republic of Venezuela from December 2, 1952, to April 19, 1953, and as President of that Republic from April 19, 1953, until January 23, 1958. During those years he exercised sovereignty over the national affairs of the Republic of Venezuela; as stated in the extradition complaint (Tr. 857), "he alone had responsibility for administering the public affairs of the Republic." On January 23, 1958, the Government headed by the petitioner was overthrown by violent revolutionary means, and the Accion Democratica Party, under the leadership of the present President of Venezuela, was returned to power.[2]

2. A long-standing political and personal enmity exists between the petitioner and Romulo Betancourt and their respective political forces. In 1945, the Accion Democratica with the aid of the military success-

[2] "The Communists joined in the revolution against Perez Jimenez, not because of any dislike of dictatorship but only because they wanted to become the dictators." Former Vice President Nixon, *Six Crises* (1962), p. 223. See also Statement of Deputy Under Secretary Murphy, Dept. of State Bulletin, June 9, 1958 (Tr. 4631-2), referring to the "rapid return of the Communists to Venezuela from exile and their intense activity . . . following the overthrow of Perez Jimenez."

fully overthrew the then Government of Venezuela and a "seven-man revolutionary junta, headed by Socialist Leader Romulo Betancourt, and including civilian and military leaders of the movement, was established". Tr. 4326. Betancourt became President in 1948. Some time thereafter the Communist Party was legally recognized. The Betancourt Government was in turn overthrown by a bloodless military coup in 1950. A new military junta, which included the petitioner as Defense Minister, assumed power. Betancourt fled into exile, and the Accion Democratica in a coalition pact with the Communist Party commenced agitation, unrest and violence in an effort to regain power. Tr. 3102-3105, 3659, 4242. Following a series of revolutionary and terroristic plots by these elements, all of which were foiled by the provisional junta Government, elections were held in 1952 and the petitioner became Provisional President and then President of Venezuela.

After the overthrow of petitioner's Government in January, 1958, petitioner and his family were forced to flee Venezuela in fear of their lives. Their property and belongings left behind were seized, burned, or destroyed. Petitioner and his family sought and obtained political asylum in the United States,[3] remaining virtually unmolested until petitioner was arrested

[3] Former Vice-President Nixon, in his book *Six Crises* (1962), p. 211, has written:

> "Perez Jiñenez, who was probably the most hated dictator in all of Latin America, had fled with his despised Chief of Secret Police, Pedro Estrada, to exile in the United States.
>
> "Our government, which does not believe that deposed rulers, no matter how despicable, should be put before firing squads without trial, granted the men sanctuary."

See also Jorge Maldonado Parilli, *Yo Luche Contra El Delito*, published in Spain in 1962, pp. 325, 330, 340, 348, detailing the events relative to petitioner's entry into the United States.

on August 25, 1959, in connection with the extradition proceedings.

B. The Extradition Proceedings

3. On July 23, 1959, the Attorney General of Venezuela preferred charges against the petitioner Jimenez in the Federal Court of Venezuela, the highest court in that Republic and now known as the Supreme Court of Justice. Tr. 1092. Three categories of crimes under the Venezuelan Penal Code were charged:

(a) Crimes against public property, consisting of embezzlement, extortion, corruption of public officers, abuse of authority and breach of his official duty;

(b) Crimes against liberty and against persons, committed "during the administration which was headed by the accused which, it is stated, under his leadership became one of the most terrible dictatorships," consisting of connivance in the murders of several public figures; and

(c) Crimes against public trust and against the state, consisting of election fraud in the national elections held on November 30, 1952, the results of which were "greatly falsified."

On July 30, 1959, the Federal Court of Venezuela, after considering evidence submitted in support of these charges, ruled that under the Venezuelan Penal Code "well-founded indications appear of the defendant's guilt of the crimes with which he is charged." Tr. 1131. And since crimes "against the State of a political nature" had been charged, the Federal Court held itself bound by Venezuelan law "to continue consideration of the charges until final judgment." Tr. 1132.

On August 12, 1952, the Federal Court of Venezuela issued a warrant for petitioner's arrest; and on the

following day it determined that extradition of the petitioner should be requested of the United States. Tr. 1074, 1075. The political crimes in the nature of electoral frauds were omitted from the bill of particulars in the request.

4. On August 24, 1959, following a formal request for extradition presented to the State Department by the Venezuelan Ambassador, the respondent Aristeguieta filed in the United States District Court for the Southern District of Florida[4] a complaint on behalf of the Government of Venezuela for the extradition of the petitioner pursuant to 18 U.S.C. § 3184. Tr. 459. The complaint prayed "that this Honorable Court issue its warrant for the preliminary or provisional apprehension and detention of the said defendant so charged, so that he may be brought before this Court or Commissioner to the end that the evidence of criminality may be heard and considered, and that he may be extradited to the Republic of Venezuela for the reasons herein alleged." Tr. 461. The complaint was sworn to before Judge Joseph Lieb, a Judge of the United States District Court at Miami, Florida. Tr. 461. Judge Lieb thereupon issued a warrant of arrest, ordering petitioner brought before him for a hearing in accordance with law and the Extradition Treaty with Venezuela. Tr. 462.

5. Petitioner was arrested on August 25, 1959, and released on bond in the amount of $25,000 by Judge

[4] The complaint, which was filed with the Clerk of the District Court, was captioned "In the District Court of the United States for the Southern District of Florida, Miami Division," and labeled Manuel Aristeguieta as the plaintiff and Marcos Perez Jimenez as the defendant. The Clerk assigned the following number to the complaint and to the case: No. 9425-M-Civil. All subsequent pleadings, motions, papers, orders and certifications bore that caption and number.

Emmet C. Choate, another Judge of the District Court at Miami. Tr. 463.

6. Petitioner thereupon filed a motion to quash the arrest warrant. Tr. 464. This motion came on for hearing before Judge William C. Mathes, a Judge of the United States District Court for the Southern District of California. At the time, Judge Mathes was assigned and designated by the Chief Justice of the United States to "hold a District Court" in the Southern District of Florida. A series of such assignments of Judge Mathes had been made, the last of which was effective "during the period beginning February 1, 1960, and ending February 29, 1960, and for such further time as may be required to complete unfinished business." Tr. 2793-2794. No additional assignment of Judge Mathes was ever made.

7. After a hearing, Judge Mathes on September 24, 1959, quashed the original warrant of arrest for failure to meet legal requirements, granted permission for the filing of an amended complaint and issued a new warrant of arrest on the basis of the amended complaint. Tr. 577-581. Petitioner's bond was continued as previously posted. Tr. 581. Subsequently, on November 23, 1959, Judge Mathes permitted the Venezuelan Government to file two more amendments to the complaint. Tr. 591.

8. Following a series of continuances, Judge Mathes on March 9, 1960 — after the period of his last assignment to the District Court for the Southern District of Florida had expired — permitted the filing of the second amended complaint, reflecting a response to petitioner's challenges to the legality of the earlier amended complaint. See Tr. 851-886. This second amended complaint became the basis for the ensuing

extradition hearing and the ultimate certification to the Secretary of State by the District Court. In substance, it charged that petitioner, during the period when he was President of Venezuela and legally responsible for the administration of the funds and contracting authority of Venezuela, had committed two distinct groups of crimes:

(a) Four charges of murder and participation in murder as an accessory before the fact. These charges were subsequently found unsupported by any evidence of probable cause and are no longer in issue.[5]

(b) Some fifteen charges of financial crimes resulting in alleged private personal gain, growing out of an "abuse of his office" (Tr. 870) relative to alleged commissions or kick-backs on government contracts, alleged securing of part of the compensation paid for land expropriated by the Venezuelan Government, alleged participation in compensation paid on construction contracts, and alleged improvements on and maintenance of his private estate at public expense.

9. Immediately upon the filing of the foregoing second amended complaint,[6] a second warrant of arrest

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[5] Judge Whitehurst stated in this connection at the hearing on June 23, 1961 (Tr. 4305): "There was a political overtone there, but I don't think that the evidence actually ever sufficiently connected the defendant with the murders."

[6] The court stated (Tr. 835): "The motion for leave to file the plaintiff's second amended Complaint will be granted upon the plaintiff verifying the Complaint heretofore lodged with the Clerk of the Court." Following the oral verification before the court, the clerk was ordered (Tr. 838) to "file the plaintiff's second amended Complaint and the warrant for the issuance thereof." Judge Mathes, in his capacity as United States District Judge, also signed the attestation appearing at the end of the second amended complaint. Tr. 886-887.

was issued requiring petitioner to be brought forthwith "before me [Judge Mathes] so that he may be dealt with according to law and pursuant to the provisions of the aforesaid treaty." Tr. 889. Once again petitioner's $25,000 bond was continued over the protests of the Venezuelan Government.

10. On May 8, 1960, following the lodging on April 12 of twelve volumes of evidence, the Venezuelan Government offered its evidence before Judge Mathes to support the charges in the second amended complaint. On May 10, two days later, an order was entered denying petitioner's motion to dismiss that complaint for insufficiency of supporting evidence. Tr. 1071.

11. After further continuance, Judge Mathes on September 21, 1960, entered an order:

(a) Permitting the filing of written memoranda in support of and in opposition to certain motions submitted by petitioner relating to the taking of depositions and inspecting documents. These memoranda were to be filed by November 21, 1960, and it was agreed by the parties "that such motions may be ruled on by the Court without further oral hearing and that an order thereon may be entered by the Court whether or not the Court is sitting in Miami, Florida at the time." Tr. 2792.

(b) Setting further proceedings herein "for December 12, 1960, at 10 o'clock A.M., at which time both the defendant and the plaintiff shall be personally present before this Court; such further proceedings shall be for the purpose of taking the oral testimony on behalf of the defendant and for such other matters as may be appropriate." Tr. 2792.

12. Before Judge Mathes could hold any hearings or enter any orders as contemplated by his order of

September 10, 1960, the Judicial Council of the Fifth Circuit on October 7, 1960, entered the following order (Tr. 2793-2794):

> "In December 1959, the Chief Justice of the United States designated Honorable William C. Mathes, United States District Judge for the Southern District of California, to hold a district court in the Southern District of Florida 'during the period beginning February 1, 1960, and ending February 29, 1960, and for such further time as may be required to complete unfinished business.'
>
> "In view of the time which has elapsed since February 29, 1960, to avoid doubt as to jurisdiction or power to act, and to provide for the effective administration of the business of said district court for the Southern District of Florida is now
>
> "ORDERED by the Judicial Council of the Fifth Circuit that any matters which might be considered 'unfinished business' still being or contemplated to be heard or considered by Judge Mathes under such designation shall be assigned to some other judge . . ."

No specific reference was made in this order to the instant extradition matter then being heard by Judge Mathes.

13. On October 31, 1960, Judge Mathes addressed a letter to Judge Choate in which he called attention to the pending motions and other pertinent matters in the instant proceeding. Tr. 2796-2798. A handwritten postscript was appended to the letter, reading:

> "P.S. It is an open question, I suppose, once this extradiction proceeding comes before another magistrate, whether the entire taking of the 'evidence of criminality' (18 U.S.C. § 3184) must be begun anew." Tr. 2798.

14. On November 17, 1960, Judge Choate wrote to respective counsel, advising them of the directive that Judge Mathes "be relieved of any further duties as respects to cases pending in the Southern District of Florida, and that the above [extradition] case be assigned to some other judge." Tr. 2902. He further advised that "the present condition of the calendars in the Miami Division" was such that it would be "sometime in 1961 before this case can be given the time and attention it will require." *Id.* Subsequently, on March 6, 1961, Chief Judge George W. Whitehurst of the Southern District of Florida ordered that this case be assigned to himself. Tr. 2924-2925. He thereupon set a pretrial conference for March 21, 1961, and a hearing on that date on all pending motions. Tr. 2925. No complaint was filed before Judge Whitehurst, nor was a new warrant of arrest issued by him. Judge Whitehurst proceeded on the basis of the second amended complaint filed before Judge Mathes and the warrant previously issued by and returnable to Judge Mathes.

15. Judge Whitehurst thereafter scheduled and held hearings on various other procedural motions. At the hearing on March 21, 1961, petitioner's counsel insisted that to rule intelligently on the issues Judge Whitehurst would have to read all the documentary and other evidence submitted to Judge Mathes by the Venezuelan Government. Judge Whitehurst apparently acquiesced, stating (Tr. 2992):

> "I am going to try to examine all of this record in that length of time. I hope to become as familiar with it as I can. I certainly would welcome the concerted assistance of counsel by distilling the facts, the evidence, but apparently you are not going to agree to that; so I am going to go through this record myself, I presume."

Counsel for the Venezuelan Government then called the Judge's attention to a "fact memorandum" that had been submitted to Judge Mathes along with the documentary evidence. That memorandum purported to summarize "the whole matter" respecting the alleged crimes as detailed in the voluminous documents. Judge Whitehurst stated that it would be "of considerable aid to the Court," with the understanding that it was just "your view of your case." Tr. 2993-2995. Although it was pointed out to Judge Whitehurst that counsel for petitioner had previously submitted to Judge Mathes a somewhat similar memorandum in support of the motion to dismiss the complaint, Judge Whitehurst indicated that he did not desire to see or read that memorandum since "Judge Mathes has already passed on that motion" and he further stated that "I would rather have the plaintiff's [Aristeguieta's] statement of his own case." Tr. 2996.

16. After hearing testimony on petitioner's behalf, receiving various documentary exhibits and later considering closing arguments, Judge Whitehurst on June 16, 1961, concluded that "the evidence overwhelmingly establishes probable cause to believe the defendant guilty of an illicit self-enrichment, by whatever name, either embezzlement, breach of trust, malversation, any one of the three would certainly comprehend that." Tr. 4253-4254. He further concluded that the evidence was insufficient to "establish probable cause or complicity in an unlawful homicide." Tr. 4254. With respect to the political character of the financial crimes, Judge Whitehurst stated (Tr. 4305):

> "I don't think they are. I don't think they have a thing to do with the political character, unless the fact that the evidence shows that the defendant

held the office of President and had directly or indirectly participated in the receipt of money which he should not have received in good faith, unless his mere holding of the office would contribute to the political ingredient, I don't think there is anything in that."

He thereupon signed an order of commitment, committing petitioner to the custody of the United States Marshal to await the action of the Secretary of State under 18 U.S.C. § 3186. See Appendix C, p. 34a, *infra*.

17. On June 23, 1961, Judge Whitehurst signed and entered a "Certification to the Secretary of State" in accordance with 18 U.S.C. § 3184. See Appendix C hereto, pp. 34a-39a, *infra*. He therein certified, "upon consideration of all of the evidence submitted, the pleadings of the parties; the arguments of counsel, written and oral, and the orders heretofore entered herein," that he deemed the evidence "sufficient to sustain the charges hereinafter specified made against the defendant, Marcos Perez Jimenez, under the provisions of the Treaty of Extradition between the United States and the Republic of Venezuela, 43 Stat. 1698." Various findings and conclusions were made in the certification, among which were:

(a) The evidence submitted was found "insufficient" to sustain the charges that petitioner was guilty of murder and of participation in murder as an accessory before the fact. Paragraph 10 of certification.

(b) The evidence submitted did sustain each of the alleged financial crimes within the intendment of Secs. 14, 18 and 20 of Article II of the Treaty "according to the probable cause standard contemplated by 18 U.S.C.

§ 3184 and Article I of the aforesaid Treaty." Paragraph 12 of certification. These crimes were found to have occurred during periods when, as President of Venezuela, petitioner "was charged with responsibility for the administration of public funds, property and contracting authority in the Government of the Republic of Venezuela." Paragraph 12 of certification.

(c) Each of the aforesaid financial crimes was found to be "for the private financial benefit of the defendant and is not a crime or offense of the political character or an act or acts connected therewith," within the scope of Article III of the Treaty. Paragraph 13 (a) of certification.

18. The Clerk of the District Court was directed by Judge Whitehurst to transmit the foregoing Certification to the Secretary of State forthwith. See p. 38a, *infra*. Simultaneously, Judge Whitehurst signed a separate document, entitled Certification of Evidence to the Secretary of State, certifying the entire record in the extradition proceeding and directing the Clerk to transmit that certified record to the Secretary of State. Appendix C hereto, p. 39a, *infra*.

19. During the course of an informal hearing in Judge Whitehurst's chambers on June 23, 1961—and before he signed the aforesaid Certification to the Secretary of State—Judge Whitehurst indicated that he had not, in fact, read the evidence presented earlier to Judge Mathes, but had relied instead on representations made by counsel for the Venezuelan Government as to the contents of that evidence. Those representations were contained in the "fact memorandum" submitted to Judge Mathes along with the voluminous documentary evidence, a memorandum called to Judge

Whitehurst's attention on March 21, 1961, by the Venezuelan Government's counsel. See Paragraph 45 of this Statement of the Case, *supra*. At the June 23 informal hearing the following colloquy took place (Tr. 4293-4):

> Mr. Walters: The point is: Does that conform with the proposition that you have read all of the evidence in connection with this?
>
> The Court: No. I haven't read all of the evidence. I simply took the counsel's analysis of the evidence.
>
> Mr. Walters: Then, your Honor, it doesn't seem—
>
> The Court: How did Judge Mathes arrive at an opinion about it at the close of plaintiff's case? Did he do that by summation of counsel?
>
> Mr. Walters: Yes, but he read all the evidence.
>
> The Court: Of course, he heard the evidence, he was the trial judge.
>
> * * * * *
>
> The Court: I have carefully read the fact memorandum,[7] the same that was presented to Judge Mathes. That is one difficulty in this case; the taking over of a case always presents a difficulty, and that seldom has to be faced.

C. The Habeas Corpus Proceedings

20. In the meantime, prior to the completion of the extradition proceedings, petitioner on April 10, 1961, had filed in the United States District Court at Miami, Florida, a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, challenging the jurisdiction to try petitioner in the extradition proceedings. Tr.

[7] This was a plain reference to the fact memorandum submitted by counsel for the Venezuelan Government, the only memorandum Judge Whitehurst wanted to see or consider. See Paragraph 15 of this Statement of the Case, *supra*.

2. Judge Sweeney of that court issued an order to show cause. On April 17, 1961, Judge McRae of that court, before whom the show cause order came on for hearing, indicated a reluctance to act while the extradition proceedings were still pending. The matter was accordingly continued.

21. On June 28, 1961, following the completion of the extradition proceedings, petitioner filed an amendment to his habeas corpus petition. The petition was thereby expanded to include not only the claim that the Act of State doctrine precluded extradition but also the claims that the extradition magistrate did not have jurisdiction, that the alleged crimes did not fall within the provisions of the Treaty of Extradition, that Judge Whitehurst's decision was not based on competent evidence, and that petitioner had not been afforded due process of law in the extradition proceedings. Tr. 63. Judge McRae, upon a reading of the amended petition, ordered the respondent marshal to show cause, if any, why the writ of habeas corpus should not issue. Tr. 80.

22. Answers, responses and traverses were duly filed by the respective parties, and the Venezuelan Government, through the respondent Consul General, was allowed to intervene. On August 22, 1961, the matter came on for hearing before Judge McRae. At that time, he limited the scope of review, under the authority of *Fernandez v. Phillips*, 268 U.S. 311, to the following elements: (a) whether the magistrate had jurisdiction, (b) whether the offenses charged were within the Treaty, and (c) whether there was any evidence warranting the finding that there was reasonable ground to believe the petitioner guilty. Tr. 132, 240.

23. Following the hearing, Judge McRae on August 23, 1961, concluded that the original and amended petitions for habeas corpus should be dismissed and the respective orders to show cause should be discharged. Tr. 241; see Appendix B hereto, p. 29a, *infra*. A previous $25,000 bond, under which petitioner had been released pending the habeas corpus proceedings, was revoked and canceled; but petitioner's request for continued enlargement on bail was granted over the protests of the Venezuelan Government, "until further order of Court" upon the posting of a $100,000 bond. Tr. 241. See Appendix B hereto, p. 32a, *infra*.

24. On December 12, 1962, the Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court dismissing the habeas corpus petitions and discharging the orders to show cause. See Appendix A hereto, p. 1a, *infra*. That court held *inter alia*:

(a) A judge of a constitutional or Article III court, such as the United States District Court, can constitutionally be authorized to act as an extradition magistrate under 18 U.S.C. § 3184;

(b) The action of the Judicial Council for the Fifth Circuit in reassigning the uncompleted extradition proceeding pending before Judge Mathes was part of "the business of the courts" over which the Council has jurisdiction pursuant to 28 U.S.C. § 332;

(c) The alleged financial crimes charged to petitioner, occurring when, as President, he had "legal responsibility for the administration of the funds and contracting authority of Venezuela," were not encompassed within the Act of State Doctrine since they were found to have been committed for petitioner's "private financial benefit";

(d) Judge Whitehurst's decision that the financial crimes were not political crimes within the meaning of the Treaty of Extradition "was based upon the evidence and is not reviewable here"; and

(e) Although Judge Whitehurst conceded that he hadn't read all the evidence but "simply took counsel's analysis of the evidence," his certification to the Secretary of State "upon consideration of all of the evidence submitted, the pleadings of the parties, the arguments of counsel, written and oral, and the orders heretofore entered herein" plus a "realistic" view of his conduct in the proceedings compels the conclusion that he examined and considered the evidence as required by the Treaty and § 3184.

D. The Collateral Proceedings

25. During the course of the extradition proceedings before Judge Mathes, the Republic of Venezuela sought to subpoena certain bank records in New York in order to use the records as evidence in support of the charges contained in the second amended complaint. This effort proved unsuccessful and the matters are now pending in two cases before this Court following the grant of certiorari. 365 U.S. 840.

26. The first case now before this Court, *Aristeguieta v. First National City Bank*, No. 1, Oct. Term, 1962, stemmed from subpoenas duces tecum signed by Judge Mathes and served upon officials of banks in New York and New Orleans. The banks and depositors, who had moved to quash, appealed to the Court of Appeals for the Fifth Circuit, urging lack of power in the District Court or the District Judge to issue a subpoena in an extradition case on behalf of the demanding government. The Fifth Circuit held in favor of the banks

and depositors, and the subpoenas were ordered quashed. *Aristeguieta* v. *Jimenez*, 274 F. 2d 206 (C.A. 5). Certiorari was granted by this Court on March 20, 1961. 365 U.S. 840. The first and primary issue thereby accepted for review was stated to be (petition, p. 2):

> "In an extradition proceeding pursuant to the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698, and pursuant to 18 U.S.C. § 3184, has a United States District Judge conducting the proceeding, or the United States District Court in which he sits, the power to issue a subpoena duces tecum in aid of the proceeding?"

27. The second case presently before this Court, also captioned *Aristeguieta* v. *First National City Bank*, No. 4, Oct. Term, 1962, arose out of an order signed by Judge Mathes permitting the Republic of Venezuela "to resort to the deposition procedure provided in Rules 26 and 45 and related provisions of the Federal Rules of Civil Procedure" with respect to the depositions of officers of three banks in New York. Subpoenas to the deponents were issued by the Clerk of the United States District Court for the Southern District of New York. Motions to quash the subpoenas were filed and overruled by Judge Ryan of the Southern District of New York. The Court of Appeals for the Second Circuit reversed and ordered the subpoenas quashed. *First National City Bank* v. *Aristeguieta*, 287 F. 2d 219 (C.A. 2). Certiorari was granted by this Court on March 20, 1961. 365 U.S. 840. The first and primary issue thereby accepted for review was stated to be (petition, p. 3):

> "In an extradition proceeding pursuant to the Treaty of Extradition between the United States

and Venezuela, 43 Stat. 1698, and pursuant to 18 U.S.C. §3184, has a district court or judge the power to issue compulsory process similar to that provided for in the Federal Rules of Civil Procedure, on the application of the demanding government, in order to secure material and relevant evidence?"

28. Further briefing and argument of the two foregoing cases have been postponed by this Court at the suggestion of the Venezuelan Government. Such postponement was proposed in the Reply Memorandum of Petitioner Respecting Mootness and Deferral of Consideration, Nos. 1 and 4, Oct. Term, 1962, "pending the outcome of the [instant] habeas corpus proceeding" (pp. 5-6). It was noted in that Memorandum (p. 3), with respect to the contention in the instant proceeding regarding the jurisdiction of the various judges in the extradition matter, that the premise asserted

> "... has a close kinship to certain of the arguments which have been advanced by the respondents in the cases here pending respecting the power of an extradition judge to issue or to approve the issuance of compulsory process to secure evidence for use in an extradition hearing."

Urging that until petitioner's habeas corpus appeal rights have been exhausted "it cannot be certain that he will fail" (p. 4), the Memorandum argued that were petitioner ultimately to prevail on the jurisdictional issue so as to require a new extradition hearing the pending cases "would at once become most lively" (p. 5). The contention thus was made (p. 5) that

> "... the very fact that the extradition defendant is now invoking an argument on the question of

the jurisdiction of the extradition judge which is so similar to one of the principal arguments made by the respondents in support of their contention that the extradition judge had no power to issue or approve the issuance of compulsory process gives added emphasis to the point made by the petitioner here that a sovereign nation, coming to these shores to seek extradition of an accused fugitive, should not be forced 'to relitigate the entire controversy from the beginning' should the habeas corpus proceeding result in renewal of the self-same extradition proceeding."

REASONS FOR GRANTING THE WRIT

This case raises questions of far-reaching significance warranting plenary consideration by this Court. Foremost in issue is the role the Constitution permits the federal judiciary to play in advising and aiding the Executive Department in the execution of its international extradition commitments. The limitations imposed by Article III on the exercise of the judicial power of the United States, when focused on the provisions of 18 U.S.C. §3184, create the gravest doubts about the validity of that statute in its use of federal judges. This constitutional issue, augmented by related procedural problems and enmeshed with questions presently pending before this Court,* would alone justify the grant of certiorari.

Equally important and equally meriting review is the question as to the proper definition of the "political offense" exception in Article III of the Treaty of Extradition between the United States and Venezuela. The meaning of that universal treaty term is of con-

* See Question 1 presented in *Argentieri* v. *First National City Bank*, Nos. 1 and 4, Oct. Term, 1962, certiorari granted, 365 U.S. 840.

timing concern in the administration of all our 65 international extradition treaties and our one multilateral convention.[9] Delineation of that concept in its application to an attempt to extradite a former head of state thus assumes an importance far beyond the interests of this particular petitioner. The uncertainty presently surrounding this matter is such as to necessitate resolution by this Court.

I. THE CONSTITUTIONAL ISSUE

The Court of Appeals *sua sponte* raised and decided the important question whether the Constitution permits a Judge of a United States District Court—a court established under Article III of the Constitution—to perform the functions of an extradition magistrate under 18 U.S.C. § 3184. See Appendix A, pp. 9a-10a, *infra*; 311 F. 2d at 555. Recognizing that this problem had not been raised, let alone decided, in any previous case, the court gave an affirmative answer.[10] In support of that result, the court cited only *In re Metzger*, 5 How. (46 U.S.) 176, involving an extradition proceeding before a federal district judge in chambers prior to the enactment of § 3184 and holding merely that his action in chambers was not reviewable in this Court.

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[9] See Note to 18 U.S.C. § 3181.

[10] The agreement of counsel at the argument that a District Judge may be so authorized is not significant. Mere consent of the parties to the exercise of jurisdiction, or agreement that jurisdiction exists, cannot by itself confer or determine jurisdiction. *Brown Shoe Co. v. United States*, 370 U.S. 294, 305; *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18.

A. The Non-Article III Nature of § 3184 Proceedings

At the threshold of this constitutional problem is the fact that international extradition proceedings encompassed by 18 U.S.C. § 3184 do not reflect the exercise of the judicial power of the United States as defined in Article III, Section 2, of the Constitution. That fact is obvious for several reasons:

(1) *No case or controversy.* As held in *Muskrat* v. *United States*, 219 U. S. 346, 356, a constitutional predicate to the exercise of federal judicial power is the submission of a "case" or "controversy" to an Article III court. Adverse parties must advance claims under the Constitution, laws or treaties of the United States; and the court must resolve those claims in an appropriate manner and render a judgment binding on the litigants. But none of those characteristics mark a § 3184 proceeding. No federal rights or duties are asserted or determined. No trial is conducted.[11] No resolution is made of the fugitive's guilt or innocence. See *Benson* v. *McMahon*, 127 U. S. 457. And no binding judgment is rendered.

The only determination made under § 3184 relates to the existence of probable cause to believe that the fugitive committed a crime mentioned in the extradition treaty. His defenses are extremely limited. And the demanding country can meet its probable cause burden in a procedural framework that gives to it

[11] "The extradition judge is not authorized to conduct a trial; he is simply empowered to hear and evaluate evidence and to decide whether there is reasonable basis for holding the accused to answer the charge of the foreign country." Memorandum for the United States as Amicus Curiae in support of petition for certiorari, No. 1, Oct. Term, 1962, p. 3. See also *Glucksman* v. *Henkel*, 221 U.S. 508, 512.

"advantages most uncommon to ordinary civil and criminal litigation"[12] under Article III.

(2) *Advisory opinion.* The result of a § 3184 proceeding is not a judgment or order in the judicial sense. If the magistrate deems the evidence sufficient under the probable cause standard, he is merely authorized to "certify the same, together with a copy of all the testimony taken before him, to the Secretary of State." § 3184. The Secretary of State may then take whatever action he deems fit, either accepting, amending or rejecting the magistrate's findings.[13] A more classic example of an advisory, non-judicial function is difficult to imagine. See *Muskrat* v. *United States*, 219 U.S. 346. A certification subject to review or reversal by an executive officer is the very antithesis of Article III judicial action. *Gordon* v. *United States*, 117 U.S. 697, 702; *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-114.

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[12] *First National City Bank* v. *Aristeguieta*, 287 F. 2d 219, 226 (C.A. 2), now pending before this Court on grant of certiorari, No. 4, Oct. Term, 1962. The circumscribed nature of the fugitive's procedural and substantial rights in a § 3184 proceeding is indicated in *Glucksman* v. *Henkel*, 221 U.S. 508, 512; *In re Oteiza y Cortes*, 136 U.S. 330, 336; *Collins* v. *Loisel*, 259 U.S. 309; *Grin* v. *Shine*, 187 U.S. 181, 188-190; and *Charlton* v. *Kelly*, 229 U.S. 447, 459-460.

[13] "The Secretary of State is not bound to extradite as a result of a judicial certification . . . . such certification does not have the effect of an enforceable command." Memorandum of the United States as Amicus Curiae in support of petition for certiorari, No. 1, Oct. Term, 1962, pp. 3-4.

In the Rudewitz case, for example, the Secretary of State declined to accept the magistrate's finding that certain alleged crimes were not of a political nature; in the Secretary's view, the crimes were "clearly political in their nature." Case of Krishian Rudewitz, Note from Secretary of State Root to Russian Ambrassador Rosen, Jan. 26, 1906; quoted in IV Hackworth, International Law 49-50 (1942).

(3) *No appellate review.* Moreover, the certification issued under § 3184 is not reviewable by any higher court in the Article III judicial system. *Collins* v. *Miller*, 252 U. S. 364, 369; *Terlinden* v. *Ames*, 184 U. S. 270, 278. Except for the limited collateral inquiry available by habeas corpus, the certification and related orders are not cognizable in any Article III court.[14]

(4) *Limited use of judicial power.* The fact that a § 3184 proceeding involves the exercise of certain incidents of judicial power, such as the issuance of a warrant of arrest, the admission to bail and the evaluation of evidence, does not elevate it to Article III status. As was said by this Court in *United States* v. *Ferreira*, 13 How. (54 U.S.) 40, 48, and reiterated in *In re Kaine*, 14 How. (55 U.S.) 103, 119, with respect to a treaty claim proceeding before a federal judge whose determination was subject to review by the Secretary of the Treasury:

> "The powers conferred by Congress upon the judge as well as the Secretary, are, it is true, judicial in their nature, for judgment and discretion must be exercised by both of them . . . But it is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States."

The short of it is, as stated by the Attorney General of the United States in 1843,[15] an extradition proceed-

[14] In this very proceeding, the Court of Appeals below previously held that it could not entertain an appeal from any kind of order, interlocutory or final, made by the magistrate in the § 3184 hearing. *Jimenez* v. *Aristeguieta*, 290 F. 2d 196 (C. A. 5).

[15] Opinion of Attorney General Nelson, dealing with the nature of a proceeding under the Extradition Treaty of 1842 with Great Britain, a proceeding which in all essential respects is now codified in § 3184. 4 Op. Att'y Gen. 201, 210-211.

ing "is not a case in law or equity within the scope and meaning of the first clause of the second section of the third article of the constitution of the United States." Or, as reiterated by another Attorney General in 1853,[16] "The judge or magistrate in this case acts by special authority under the act of Congress; no appeal is given from his decision by the act; and he does not exercise any part of what is, technically considered, the judicial power of the United States." Indeed, the respondent Aristeguieta has conceded as much, claiming rather that "the extradition judge [is] a special legislative tribunal charged with a judicial responsibility and possessing judicial powers."[17]

The § 3184 proceeding is thus nothing more than an extrajudicial advisory adjunct to the executive power to extradite, incompatible with the limitations upon judicial power which this Court has drawn from Article III. See *Glidden Company* v. *Zdanok*, 370 U. S. 530, 582; *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-114; *Hayburn's Case*, 2 Dall. 409.

B. The Attempted Distinction Between Article III Courts and Judges

The nonjudicial advisory function created by § 3184 plainly could not be imposed upon an Article III tribunal, such as the United States District Court for

[16] Opinion of Attorney General Cushing, 6 Op. Att'y Gen. 91, 96.

[17] Petition for certiorari in *Aristeguieta* v. *First National City Bank*, No. 1, Oct. Term, 1962, p. 24. It is further stated therein (pp. 20-21) that the § 3184 proceeding need not be "one within the strict scope of Article III of the Constitution" and that it is enough "to show that the extradition judge has a special judicial responsibility by statute, and hence must be accorded the powers of a statutory tribunal, including the subpoena power."

the Southern District of Florida. *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-114. But on its surface, § 3184 does not extend its authorization to Article III courts; it speaks only of justices and judges of the United States.[18]

The constitutional problem thus is one of determining whether nonjudicial power, incapable of being exercised by a United States District Court, may nevertheless be granted to or exercised by a judge appointed or assigned to sit on that court. Does Article III of the Constitution permit a distinction, in terms of the limitations on the exercise of the judicial power of the United States, between a federal judge and the constitutional court on which he sits? Can those limitations be avoided simply by designating the judge as the vehicle for exercising non-Article III power?

This Court has not supplied definitive answers to those questions.[19] It has made plain the non-Article

[18] Jurisdiction to act under § 3184 is given to "any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State." Since United States Commissioners and state court judges do not share in the exercise of Article III judicial power, the constitutional issue does not exist as to them. The fact that judges of the United States do exercise Article III judicial power not only distinguishes them from commissioners and state court judges but heightens the constitutional problem when they are called upon to perform nonjudicial functions.

[19] In *Hayburn's Case*, 2 Dall. 409, Chief Justice Jay, Associate Justice Cushing and District Judge Duane, sitting as the Circuit Court for the District of New York, expressed the view that individual judges of the circuit court could render advisory opinions on pension claims against the Government, subject to review by the Secretary of War, by voluntarily agreeing to act as "commissioners" rather than as a court. But that was not a decision by

III nature and hence the non-reviewability of the determinations of an individual judge or commissioner in the extradition-type proceeding.[20] But the issue whether it is constitutionally permissible for a federal judge to engage in such non-judicial activity has never before been squarely posed or resolved.

"Last term this Court indicated that the capacity of an individual judge to participate in an Article III judicial proceeding derives from the constitutional status of the court to which he was appointed. *Glidden Company* v. *Zdanok*, 370 U.S. 530. Implicit in that determination is the concept that, for purposes of Article III, the scope of judicial power and its limitations relate both to Article III tribunals and Article III judges thereof.[21] No indication was given that an

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this Court, as noted in *United States* v. *Ferreira*, 13 How. (54 U.S.) 40, 49. See Hart and Wechsler, The Federal Courts and the Federal System 100-102 (1953). Cf. this Court's determination in *Glidden Company* v. *Zdanok*, 370 U.S. 530, discussed in footnote 22, *infra*.

[20] *In re Metzger*, 5 How. (46 U.S.) 176; *United States* v. *Ferreira*, 13 How. (54 U.S.) 40; *In re Kaine*, 14 How. (55 U.S.) 103; *In re Oteiza y Cortez*, 136 U.S. 330; *Todd* v. *United States*, 158 U.S. 889. The Court of Appeals below noted that these cases "only determine that the jurisdiction of appellate courts has been confined to review of certain orders and judgments of 'courts' and does not extend to review of the extradition 'judge's' findings." Appendix A hereto, p. 9a, *infra*.

[21] In *Glidden*, innumerable references were made to "Article III judges" who had been appointed to Article III courts. See 370 U.S. at 539, 540, 593, 604. While an Article III judge is partially identifiable in terms of his Article III tenure and compensation, he is also so designated only if the court to which he was appointed has Article III status. Thus there is a necessary identity between an Article III court, with its constitutional limitations of power, and the judges composing such a court. And see 28 U.S.C. § 132(b), defining a federal district court as consisting of "the district judge or judges for the district in active service."

individual judge's power could lawfully exceed that of his court, or that he was free to act in nonjudicial matters.[22]

Indeed, the necessary premise of Article III, which underlay the *Glidden* result, is a confinement of the judicial branch of government, whether in the form of courts or judges, to the exercise of the judicial power of the United States. That premise dictates against permitting a legislative grant of nonjudicial power to an Article III judge. To be effective, Article III's prohibition of advisory opinions by constitutional courts must extend to constitutional court judges. Otherwise the restriction could be completely evaded. What Article III precludes a judge from doing in his capacity as the District Court would then be permissible simply by considering him to be an individual officer divorced from his Article III status. Article III limitations on judicial power would be reduced to mere rhetoric. And the constitutional doctrine of separation of powers, whereby "the persons entrusted with power in any one of these [three] branches shall not be permitted to encroach upon the powers confided to the others," *Kilbourn* v. *Thompson*, 103 U.S. 168, 191, would be dissipated.

Particularly is the distinction between court and judge meaningless where, as here, the exercise of the § 3184 nonjudicial function is said by the Government

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[22] In considering the effort by Congress to impose non-Article III advisory functions on the Court of Claims, the opinions of Mr. Justice Harlan and Mr. Justice Clark in *Glidden* viewed that effort as presumptively invalid. 370 U.S. at 582, 587. Thereby rejected was the explanation offered by the Court of Claims in *Sanborn* v. *United States*, 27 Ct. Cls. 485, that these advisory functions were extra-judicial tasks voluntarily undertaken by the judges in the capacity of commissioners.

to be possible only "with all the normal attributes of the judicial machinery, including the subpoena power" and where Congress is said to have intended the judge to use "normal judicial power" and "the accepted judicial modes" in properly performing his duty under § 3184.[23] Judicial machinery, judicial power and judicial modes all connote the machinery, the power and the modes of the entities known to us as courts or tribunals. And if that be true, then it is fair to say that Congress, in using the term "judge of the United States" in § 3184, really referred to a "court of the United States."[24] The constitutional implications of that conclusion need no elaboration.

The attempted distinction, in Article III contemplation, is plainly intolerable. It rests on what has been called a "metaphysical dialectic in which a United

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[23] Memorandum for the United States as Amicus Curiae in support of petition for certiorari, No. 1, Oct. Term, 1962, p. 4.

[24] Many instances may be found where Congress has used the words "judge" and "court" interchangeably and where Congress, in using the word "judge", was found to have invoked the judicial power of the United States as exercisable by federal courts. See instances collected in *In re United States*, 194 U.S. 194, and in *Craig* v. *Hecht*, 263 U.S. 255; cf. *Betts* v. *Brady*, 316 U.S. 455, 458-460.

Where, as here, Congress has sought to impose duties on a District Judge which require him to exercise "all the normal attributes of the judicial machinery," the applicability of Article III is not lost simply because Congress used the word "judge" rather than "court." Put somewhat differently, in the concurring words of Circuit Judge Brown in *Jimenez* v. *Aristeguieta*, 290 F. 2d 106, 108 (C.A. 5), "the only basis upon which Congress by § 3184 may have imposed the duty of conducting the hearing on the person of the Judge is that it is a judicial function calling for the performance of a judicial act." But such a function and such an act, leading as they do to the entry of an advisory opinion, do not qualify as part of the judicial power of the United States within the scope of Article III.

States Judge is something less than a Judge and while performing judicial functions is something different from a District Court."[25] It is that "metaphysical dialectic" upon which § 3184 purports to extend to District Court judges the power to render advisory opinions to the Secretary of State. Therein lies its constitutional defect.

No answer to this constitutional problem is afforded by the description of a federal judge's function under § 3184 as of the character of ordinary preliminary examinations following an arrest for some federal criminal offense.[26] As Mr. Justice Brandeis noted, speaking for the Court in *Collins* v. *Miller*, 252 U. S. 364, 369, commitment proceedings in the usual criminal case before an individual federal judge come "under the court's authority to assume control in the preliminary stages of *matters of which it has the final decision under the law.*" [Emphasis added.]

Extradition proceedings under § 3184, on the other hand, do not relate to matters over which the judge or court has final decision under the law. Rather they are "ancillary to a power in its nature political, created

[25] The quoted words are those of Circuit Judge Brown, rejecting the distinction between a District Judge and a District Court but concurring in the refusal of the Court of Appeals below to entertain an appeal from an interlocutory order of the extradition magistrate in this proceeding. *Jimenez* v. *Aristeguieta*, 290 F. 2d 106 at 108 (C.A. 5). He also added: "The peculiar nature of extradition proceedings and the acknowledged unappealability of the final certification to the Secretary of State does not make the action of this human being who hears the matter solely because he is a Judge an action of some entity other than the Court of which he is an indivisible part."

[26] The proceedings under what is now § 3184 were so described in *Benson* v. *McMahon*, 127 U.S. 457, 463, where a United States Commissioner had presided at the hearing.

not by the constitution, but emanating from the concurrent wills of two independent governments" and "are confined to the ascertainment of facts which can weigh nothing in any consequent and purely judicial investigation of the charge."[27]

A function thus ancillary to a political rather than a judicial power is constitutionally suspect when performed by an Article III judge. To ignore the purpose and the thrust of what the judge does is to ignore the purpose and the thrust of the Article III limitations on the exercise of judicial power. And when judicial power is exercised by a judge solely to aid and advise the Executive Department in the execution of its political extradition power, the Article III limitations take effect. At that point, certainly, Article III can recognize no distinction between court or judge if the limitations are to be effective. Constitutional sanction is therefore lacking for the effort of § 3184 to invest District Judges with jurisdiction to aid in the effectuation of a political power.

C. The Breakdown of Any Court-Judge Distinction in This Case

For purposes of Article III, no valid distinction can be drawn between a District Court and a District Judge. But even if it be conceivable that some fine line of demarcation could be drawn, the line was neither recognized nor followed in this case. No effort was made to preclude the District Court for the Southern District of Florida as such from participation in the § 3184 proceedings.

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[27] Opinion of Attorney General Nelson, 4 Op. Att'y Gen. 201, 210-211 (1843).

On the contrary, from beginning to end, the § 3184 proceeding was marked by an invocation of the powers, the processes and the personnel of the District Court for the Southern District of Florida. The District Court was so completely identified with the proceeding that it now becomes impossible to distinguish this matter, in terms of its pendency before the court, from any of the countless other cases then pending before that tribunal. In every sense, the District Court was called upon to, and did in fact, render an advisory opinion to the Secretary of State contrary to the established principles of Article III.

That such was the true nature of the District Court's participation in this case is evident from the following cumulative factors:

(1) The complaints, pleadings, motions, orders, certifications, briefs, memoranda, and all other papers in the proceeding were headed "In the United States District Court for the Southern District of Florida, Miami Division" and filed with the Clerk of that court. Manuel Aristeguieta was named as the plaintiff and the respondent herein as the defendant. The Clerk, treating the case as he would any other filed in the court, assigned to it a number, No. 9425-M-Civil.[28] In short,

[28] At the opening of the § 3184 hearing before Judge Mathes on September 4, 1959, the following colloquy took place (Tr. 465):

> THE COURT: Now No. 9425, Manuel Aristeguieta against Marcos Perez Jimenez. Is this a civil case?
>
> MR. WARD [for the plaintiff]: Your Honor, this is one of these matters that is very much neither fish nor fowl, but the authority for the proceeding is in Title 18, Criminal Procedures.
>
> THE COURT: We had one out in our district, a proceeding to extradite the former foreign minister of Yugoslavia, Artukovic. That was treated as a criminal matter.

[Footnote cont'd on next page]

as stated on behalf of Manuel Aristeguieta, in his petitions to this Court for writs of certiorari (Nos. 1 and 4, Oct. Term 1962, pp. 3 and 4, respectively), the complaint was filed, and the extradition proceeding was held, "in the United States District Court for the Southern District of Florida."

(2) Nearly all the proceedings were had in one of the regular court rooms, although a few matters were determined in chambers as frequently happens in the ordinary case. No conscious effort was made to confine the hearings to the chambers of any of the District Judges or otherwise to segregate the proceeding from others pending before the court. Cf. *In re Metzger*, 5 How. (46 U.S.) 176, 191, where this Court, holding that the action of the extradition magistrate was unreviewable, emphasized that the extradition proceeding under consideration "was heard and decided by the district judge at his chambers, and not in court."

(3) The complaint, as originally filed and as amended, prayed that "this Honorable Court" issue "its" warrant for arrest and that the defendant be brought before "this Court or Commissioner" for extradition proceedings. Tr. 461.

(4) At least four District Judges, acting in discharge of the duties of the District Court, were assigned to deal with various aspects of the case. They each signed various orders and certifications in their capac-

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MR. WARD: At least the consequences, if nothing else, are criminal in nature.

THE COURT: It is, yes, rather anomolous procedure. I can understand how the clerk would wonder where to put it, but in any event, it is entitled the plaintiff-defendant, and I should think it should be given a criminal number, Mr. Clerk, prepared as a criminal case. [No criminal number was ever given the case.]

ity as "United States District Judge," the same as they do in connection with other matters pending before the District Court.

(5) Judge Mathes, of the Southern District of California, presided over the case only by virtue of his assignment and designation by the Chief Justice to "hold a District Court" in the Southern District of Florida.[29]

(6) Judge Mathes was removed from the case by direction of the Judicial Council of the Fifth Circuit "in order to provide for the effective administration of the business of said district court for the Southern District of Florida." Tr. 2793-2794. This action by the Judicial Council was taken pursuant to its statutory authority to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." 28 U.S.C. § 332. The Council further ordered that the case be assigned to some other judge, as a result of which Chief Judge Whitehurst of the Southern District of Florida assigned the case to himself. Several months elapsed before the hearing in the case resumed, due to "the present condition of the calendars in the Miami Division." Tr. 2902.

(7) The Court of Appeals below described this extradition proceeding as part of "the business of the courts" and the order of reassignment as "a proper exercise" of the Judicial Council's authority conferred by 28 U.S.C. § 332. See Appendix A hereto, p. 9a *infra*. Obviously, had Judge Mathes been conducting the proceeding in any capacity other than as the District

[29] This assignment was made pursuant to 28 U.S.C. § 292(c), permitting an assignment of "a district judge of one circuit for service in another circuit, either in a district court or court of appeals."

Court, the Judicial Council would have had no authority to end his jurisdiction or to seek his reassignment.

(8) During the extradition proceedings, the respondent Aristeguieta sought the aid not only of the District Court for the Southern District of Florida but of the District Court for the Southern District of New York in securing subpoenas and depositions. See petitions for certiorari, Nos. 1 and 4, Oct. Term, 1962. Both the respondent Aristeguieta and the opposing banks sought to invoke the portions of the Judicial Code and the Federal Rules of Civil and Criminal Procedure they deemed relevant. They were thereby attempting, in one way or another, to bring into operation what the Government has described as "all the normal attributes of the judicial machinery, including the subpoena power,"[30] which attributes are those of the District Court rather than of any particular judge thereof considered in isolation.

The totality of these circumstances erases any delimitation of this § 3184 proceeding to one conducted by a magistrate as distinct from the District Court. In all respects, the proceeding was filed in, conducted by and adjudicated in the District Court for the Southern District of Florida, defined by law to consist of "the district . . . judges for the district in active service." 28 U.S.C. § 132(b). Only one of two conclusions is possible:

(a) This case only further demonstrates the lack of any meaningful distinction, for Article III purposes, between a District Court and a District Judge, in which event the advisory jurisdiction of § 3184 may not under

[30] Memorandum for the United States as Amicus Curiae in support of petition for certiorari, No. 1, Oct. Term, 1962, p. 4.

the Constitution be exercised by either the District Court or any judge thereof; or

(b) If any legal distinction can be drawn between a court and a judge, that distinction was completely ignored here and the § 3184 proceeding was in fact conducted by the District Court for the Southern District of Florida. It is too late in the day to rewrite the procedures employed in this case, procedures which led to a certification inconsistent with the constitutional limitations on the exercise of judicial power by federal district courts.

D. The Relationship to the Two Cases Pending Before This Court

In the two related cases now pending on plenary review by this Court, *Aristeguieta* v. *First National City Bank*, Nos. 1 and 4, Oct. Term, 1962, 365 U.S. 840, the following basic question, from which certain subsidiary ones spring, has been accepted for consideration:

> "1. In an extradition proceeding pursuant to the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698, and pursuant to 18 U.S.C. § 3184, has a United States District Judge conducting the proceeding, or the United States District Court in which he sits, the power to issue a subpoena duces tecum in aid of the proceeding?"[31]

[31] This is the first question presented in the petition for certiorari in No. 1, p. 2. The first question presented in the petition in No. 4, p. 3, is substantially the same except that instead of referring to "the power to issue a subpoena duces tecum in aid of the proceeding" it speaks of "the power to issue compulsory process similar to that provided for in the Federal Rules of Civil Procedure, on the application of the demanding government, in order to secure material and relevant evidence."

Further briefing and oral argument in these two cases have been postponed by this Court to await the filing and consideration of the instant petition. See paragraph 28 of the Statement of the Case herein, *supra*, p. 24. As stated by the respondent Aristeguieta in seeking postponement of further action in those two cases,[32] the premise of the jurisdictional problem here at issue has "a close kinship" and is "so similar" to the principal arguments advanced in Nos. 1 and 4 as to make it appropriate for this Court to await the arrival of this case. The entanglement of the arguments in Nos. 1 and 4 with the basic constitutional problem presented by this petition is at once obvious. The very statement of the quoted question, with its admixture of reference to both the District Judge and the District Court, reflects the complete identity of judge and court which marked the course of the § 3184 proceedings. But more importantly, the resolution of the procedural problems in Nos. 1 and 4 is possible only after the nature of a § 3184 proceeding is determined and the constitutional issue settled. Only if this Court were to hold that a District Judge has the constitutional capacity to conduct a § 3184 proceeding, but that there was some other defect requiring a new hearing, would the procedural problems in Nos. 1 and 4 retain vitality.

If neither the District Court nor a District Judge can constitutionally engage in the advisory jurisdiction of § 3184, however, the questions relating to a judge's power to issue subpoenas or other compulsory process in such a proceeding become moot; questions as to the subpoena power available through a United States

[32] Reply Memorandum of Petitioner Respecting Mootness and Deferral of Consideration, Nos. 1 and 4, Oct. Term, 1962.

Commissioner or a state court judge would have to await another day. To be sure, if a constitutional divide can be found to separate a judge and a court, the complete commingling of the entities in this case might require a new hearing before a segregated judge and the procedural problems would then become meaningful within that narrow frame of reference.

Moreover, the arguments advanced by the petitioners and by the United States in the petitions and memorandum in Nos. 1 and 4 lend convincing weight to the proposition here advanced that, in fact and in the contemplation of Congress, the § 3184 proceeding is designed to invoke the full judicial power of the United States in a manner inconsistent with the dictates of Article III. To refer only to the memorandum of the United States in No. 1, the argument is there made that the § 3184 proceeding is "a legislative creation" with "no exact counterpart in our system of jurisprudence" (p. 7). Congress is said to have "delegated these [fact-finding] functions to the judiciary" and to have decided "to use normal judicial power" in order to effectuate these unique functions (p. 7). The duties thus imposed, it is asserted (p. 4), were intended by Congress "to be performed with all the normal attributes of the judiciary machinery" and of "the accepted judicial modes." Emphasis is also placed (p. 7) upon the alleged applicability of the All-Writs Statute, 28 U.S.C. § 1651, conferring upon "courts" the power to issue all writs necessary or appropriate "in aid of their respective jurisdictions."

A complete invocation of the judicial power of the United States is thus offered in support of the advisory functions of § 3184. These contentions of the Government, repeated by the petitions themselves in Nos. 1

and 4, raise in its baldest form the constitutional problem presented herein. Plainly, the cases need to be considered together.

E. The Great Importance of the Constitutional Issue

Petitioner submits that the constitutional problem posed by this case, as was said by the Government in the related cases,[33] encompasses "general considerations of considerable international importance." If the question presented by the somewhat narrower subpoena problem in Nos. 1 and 4 is of such concern to the responsibility of this Government to honor the stipulations of its extradition treaties, the basic constitutional issue presents even greater international significance. The constitutional capacity of federal judges to advise the Secretary of State in fulfilling extradition commitments under the existing 65 treaties, plus one multilateral treaty, is indeed important in determining how our international commitments can be met.

But the Treaty of Extradition with Venezuela, in its reference to our obligation to use "every legal means" to aid in extradition matters, 43 Stat. 1698, 1705, was not designed to override any means that clearly infringes upon our constitutional separation of functions. And our system of limited powers is too important to bow to any consideration of convenience or ease that may attach to the use of federal judges in extradition matters. Hence, the issue arising under Article III of the Constitution maintains its full and independent significance.

Without exception, this Court has rejected every effort to circumvent or dilute the Article III delinea-

[33] Memorandum of the United States as Amicus Curiae in support of petition for certiorari, No. 1, Oct. Term, 1962, p. 2.

tions as to the exercise of the judicial power of the United States. The plain inconsistency between § 3184 and those delineations warrants the grant of review in this case. The "general rule inherent in the American constitutional system, that ... the judiciary cannot exercise either executive or legislative power," *Springer v. Philippine Islands*, 277 U.S. 189, 201-202, demands further amplification in these circumstances.

II. THE TREATY ISSUE

For the first time in history a government has sought the extradition of a former head of state solely for an alleged abuse of his office occurring during and under his administration of the powers of government.[34] Quite apart from the purely political connotations of that effort,[35] a serious and unresolved problem emerges as to the standard for judging whether such an individual is legally subject to extradition under the terms of the relevant treaty.

In common with all our extradition treaties, Article III of the Treaty of Extradition between the United States and Venezuela expressly precludes extradition "for any crime or offense of a political nature." It further excludes, as a basis for extradition, those "acts connected with such crimes or offenses." The issue here relates to the application of those provisions in the totality of political circumstances in Venezuela.

[34] Cf. *In re Ezeta*, 62 Fed. 972 (N.D. Cal.). *See* Note, *The Trial of Ex-Rulers*, 7 Tulane L. Rev. 279, 285 (1933), stating that it is unlikely that any nation will "surrender to another the refugee ex-chief of the latter for trial, no matter how much the really political charges of treason or rebellion may be disguised superficially with specifications of fraud or some common crime."

[35] The Department of State has acknowledged that this case "has great political importance in Venezuela." Tr. 129.

to an overthrown head of state accused by his political opposition of having committed certain common crimes, to his own financial benefit, during the period of his reign in office.

This Court has wisely refrained from attempting any single formulation of the concept of a political offense or an act connected therewith. Indeed, it has been said that "no uniform criterion exists in regard to this concept so vitally related to the protection of human rights" and that there is "no fundamental agreement among governments and domestic tribunals as to precisely what constitutes a political offense under extradition treaties."[36]

This is a reflection of the ever-changing patterns of polities and revolutions, patterns which permit no rigid or easy characterization. Accepting that fact, judicial and legal authorities have generally rejected the necessity or desirability of a universally applicable description of the political offense. The question whether a particular act can be so categorized, John Bassett Moore once wrote,[37] "is pre-eminently circumstantial." Or, as British Judge Cassels stated,[38] "The words 'offence of a political character' must always be considered according to the circumstances existing at the time when they have to be considered." See also *Karadzole* v. *Artukovic*, 247 F. 2d 198, 202-203 (C.A. 9). Such was also the approach of this Court in *Ornelas* v. *Ruiz*, 161 U.S. 502, 511-512, approving the use by the extradi-

[36] Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 Va. L. Rev. 1226, 1227 (1962).

[37] 1 Moore, Extradition and Interstate Rendition 308 (1891).

[38] *Ex parte Kolczynski*, [1955] 1 Q.B. 540, 549. See also opinion of Lord Denman in *In re Castioni*, [1891] 1 Q.B. 149, 155.

tion commissioner in that case of all the relevant background facts in his resolution of the political crime claim.

In this case, however, no attempt has been made to view the alleged financial crimes against the vast backdrop of political turmoil in Venezuela. The extradition judge simply found that each such crime "was for the private financial benefit of the defendant and is not a crime or offense of a political character or an act or acts connected therewith." Appendix C hereto, p. 38a, *infra*. In ruling that this finding "was based upon the evidence and is not reviewable here," the Court of Appeals viewed the evidence in light of what it apparently conceived to be the solely relevant standard as to political crimes—i.e., whether "the financial crimes charged were committed in the course of and incidentally to a revolutionary uprising or other violent political disturbance." Appendix A hereto, p. 19a, *infra*.

Such a standard may indeed be relevant in other contexts to determine if the evidence shows that the acts of the fugitive occurred as part of a revolutionary movement or violent disturbance against the government then in power. See *Ornelas v. Ruiz*, *supra*; *United States v. Artukovic*, 170 F. Supp. 383, 392 (S.D.Cal.), on remand from this Court, 355 U.S. 393. But this formulation is meaningless in the present situation, involving a far different and more complex set of political circumstances. The flexibility that marks the political offense criterion abjures the limited and irrelevant approach of the court below.

Indeed, so completely political is the situation here that as a matter of law, and therefore of jurisdiction of the extradition magistrate (*In re Ezeta*, 62 Fed. 972,

997 (N.D. Cal.)), there was no alternative but to hold the petitioner non-extradictable by virtue of Article III of the Treaty. At the very least, the situation demands the use of all the relevant background facts in arriving at a more realistic and pertinent formulation of the political offense concept for application in this case. To that end, the following considerations become critical and should have been considered below:

(1) The fact that the alleged financial crimes were found to involve private financial benefit to the petitioner is only the beginning, not the end, of the political offense inquiry. Article III of the Treaty, barring extradition for "acts connected with such [political] crimes or offenses", encompasses the common crimes here involved to the extent that they are linked with political disturbances. Attention must therefore be focused on the degree of connection between the crimes and the political realities.[39] And in interpreting and applying that treaty principle, this Court's dictum in *Grin* v. *Shine*, 187 U.S. 181, 185, is pertinent:

> "Care should doubtless be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice, or forcing the surrender of political offenders."

[39] At least three fundamental approaches to this problem have been developed: the incidence test of Anglo-American law, the political objective test of French law, and the political motivation test of Swiss law. It has been said that "in marked contrast with the early English law which required a direct relation between the common crime and the political act, the American law seems to have adopted a more liberal attitude by simply requiring any connection, however feeble, between a common crime and a political disturbance." Garcia Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 18 Va. L. Rev. 1226, 1241 (1962).

(2) At the heart of the political inquiry are the historical facts of the long and constant struggle for power in Venezuela between the Betancourt forces and the Jimenez forces. Betancourt's original reign was ended in 1950, when the Jimenez government took over, to be followed in 1958 with a violent revolution restoring Betancourt. Violence, armed outbursts and assassinations marked these years of governmental involutions. And out of those years developed a bitter personal and political enmity between Betancourt and Jimenez. Petitioner Jimenez is viewed by his political opponents as a "corrupt dictator" who exercised absolute and unbridled authority while in power and who was responsible for countless crimes against persons, property and the government.

(3) Among the many charges made against petitioner by the Betancourt government was one that he "stole" the 1952 election and "greatly falsified" the returns so as to be proclaimed Provisional President. This charge was formalized by the Attorney General of Venezuela in 1959 in seeking a warrant of arrest from the Venezuelan Federal Court. But because of its purely political nature, the charge was not included in the extradition request or complaint.[9] It still remains pending before the Venezuelan high court.

(4) The four murder charges included in the extradition complaint were dismissed for lack of sufficient supporting evidence—but not before Judge Whitehurst

[9] In his brief to the court below, at p. 22, the Venezuelan Consul General repeated the charge that in 1952, when the discontented people "voted the wrong way", petitioner Jimenez "stole the election" and "had himself 'chosen' provisional President of the Republic."

discovered that there "was a political overtone" to these charges. Tr. 4305.

(5) The fifteen financial crimes charged to petitioner all arose out of an alleged "abuse of this office" during the years when, as dictatorial head of state, he was "charged with responsibility for the administration of public funds, property and contracting authority" of the Republic of Venezuela. Charges of maladministration and abuse of office, even to the point of pocketing public money, have long been hallmarks of political maneuvers. Particularly is that obvious in the context of the prolonged political contest in Venezuela.[41]

(6) Precisely because these alleged acts occurred while petitioner was the head of state and in supreme charge of the sovereign affairs of Venezuela, charges of maladministration necessarily involve a review and a judgment of the validity of the sovereign acts of Venezuela at a time when that nation was officially recognized by the United States. To trace and determine how official acts of land condemnation were carried out, or how public contracts were made and executed, is to examine into the internal workings of a sovereign government and its numerous agencies. And when that task is undertaken by the courts of another government—even to the limited extent of determining probable cause for extradition purposes—the principle that the validity of the acts of one sovereign state ought not to be re-examined and perhaps condemned by the courts of another becomes highly pertinent.

[41] Judge Whitehurst denied petitioner's motion for leave to take depositions in Venezuela and Europe, which would have developed further the essentially political character of the alleged financial crimes. Tr. 4211-4214. This limitation on the development of the critical political factors may be such as to warrant a new extradition hearing under § 3184.

Oetjen v. Central Leather Co., 246 U.S. 297.[42] But even if the Act of State doctrine be not applied, the essentially political nature of these sovereign acts, and transgressions thereof, must be recognized. Combined with the political mores of a country, maladministration of public affairs may produce one important type of political offense within treaty contemplation.

(7) The fact that the petitioner was granted asylum in the United States because of the dangerous situation in Venezuela deepens the political coloration of the effort to extradite him. See Nixon, Six Crises (1962), p. 211.

Consideration of the foregoing factors permits a realistic formulation of the political offense concept for purposes of this application of Article III of the Treaty. Either (a) the offenses growing out of alleged maladministration of the affairs of government by a former head of a sovereign state recognized by the United States are in themselves political offenses, or (b) such alleged offenses are acts connected with the manifold political crimes and charges leveled by petitioner's political opposition. The underlying mosaic reveals the fundamentally political nature of the extradition claims. They are but the aftermath of a violent upheaval. See *In re Mylonas*, 187 F. Supp. 716 (N.D. Ala.).

In short, the court below erred in holding that a political crime or an act connected therewith must, for treaty purposes, arise out of violent revolutions or

[42] The Act of State doctrine is applicable even though the foreign law may have been violated. "So long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws." *Banco De Espana v. Federal Reserve Bank* 114 F. 2d 438, 444 (C.A. 2).

disturbances against established governments. The underlying situation may also involve the more subtle and discriminatory political practices indulged in by succeeding, antagonistic governmental authorities. Governmental recriminations against those violently ousted from power, charges against them of maladministration of sovereign power and personal pilfering, all coalesce to establish the political nexus.

The political offense principle codified in Article III of the Treaty was meant to be flexible enough to adapt itself to the unique political situation revealed by this case. The failure of the courts below to read and apply Article III of the Treaty in the light of the political facts of Venezuelan life raises issues important to the proper interpretation and application of all our extradition treaties. For that reason, review should be granted.

III. THE PROCEDURAL ISSUES

The remaining procedural issues in this case may be alluded to briefly. They arise mainly because of the uncertainty as to the constitutional capacity of a District Judge or District Court to participate in § 3184 proceedings and because of the resulting inability to categorize the nature of those proceedings.

A. The Assignment Limitations of Judge Mathes

If a United States District Judge, such as Judge Mathes of the Southern District of California, be deemed constitutionally capable of sitting as an extradition magistrate under § 3184, a serious question is posed as to whether he ever acquired jurisdiction in this case.

His last assignment to the Southern District of Florida was for the period ending February 29, 1960

"and for such further time as may be required to complete unfinished business." Tr. 2793. He was further limited, after the expiration of his assignment, by the express provisions of 28 U.S.C. § 296, confining him to the final disposition of matters "submitted to him during such period" of assignment. But on March 9, 1960, without a new assignment being in effect, Judge Mathes permitted the filing of a new second amended complaint, performed the jurisdictional act of issuing a new warrant of arrest, and released petitioner on a new bond. Tr. 835-838. A completely new proceeding was thus instituted, one that cannot be described as the continuation of unfinished business previously pending before Judge Mathes. See *Hrass* v. *Graven*, 257 F. 2d 1, 4 (C.A. 8), certiorari denied, 358 U.S. 835. Indeed, so patently serious is the jurisdictional problem thus created that the Judicial Council, in an effort to minimize possible "doubt as to [Judge Mathes'] jurisdiction or power to act" after the February 29 date, finally ordered his cases in Miami reassigned. See p. 14, *supra*.

The decision in *Frad* v. *Kelly*, 302 U.S. 312, holds void any order of a judge in a new matter that was not part of a case pending before him prior to the expiration of his designated assignment. In this case, after authorizing the filing of a second amended complaint, Judge Mathes ordered the issuance of a new warrant of arrest, accepted all the demanding government's evidence, and ordered that petitioner's motion to dismiss the complaint in light of that evidence be overruled. Such orders cannot stand in light of the decision in *Frad* v. *Kelly* and the express time limitations of the assignment.

B. The Problems Raised By Judge Whitehurst's Participation

Judge Mathes' departure and Judge Whitehurst's entry into the case created additional problems. If Judge Mathes participated in the matter on some basis other than as the District Court, his removal from the case, in the exercise of the administration of the business of the courts, was unwarranted. If he was a mere extradition magistrate, acting as an individual under § 3184, his jurisdiction to continue in the case was unaffected by court business or court assignments. On the other hand, if Judge Mathes was properly removed in the process of administering the business of the courts, Judge Whitehurst's entry into the case poses a new set of questions. Should he have issued a new warrant of arrest, held a new hearing and heard and considered the evidence anew? Was he governed by the Federal Rules of Civil Procedure as asserted in the petitions in Nos. 1 and 4, Oct. Term, 1962? If so, does Rule 63 preclude him from entering a certification based on a transcript of the demanding government's evidence admitted by another judge?[43]

As Judge Mathes himself noted, Tr. 2798, § 3184 plainly contemplates that "the evidence of criminality" be "heard and considered" by the judge or commissioner who issued the warrant of arrest. More pertinently, once a judge has issued a warrant of arrest returnable to himself and has received and heard all

[43] Rule 63, relating to procedure where a judge becomes disabled after a verdict is returned or findings and conclusions filed, "does not [in the absence of consent] authorize a judge in a court action to enter a judgment on the basis of the transcript of the trial before another judge" who is unable to continue. 7 Moore's Federal Practice 1457-1458 (2d ed. 1955). The implication of Rule 63 is that in situations where a verdict has not been returned or findings not yet filed a new trial is required.

of the evidence submitted by the demanding government, as Judge Mathes did in this case, a statutory problem arises as to whether a successor magistrate can make the final certification—particularly where the original magistrate is not incapacitated or not otherwise unavailable. No answer is provided by *Grin v. Shine*, 187 U.S. 181, holding merely that a warrant of arrest issued by a judge may be made returnable before a commissioner or some one else other than the issuing judge.

The situation is complicated by Judge Whitehurst's conceded failure to read all of the evidence submitted by the Venezuelan government relative to the financial crimes. Tr. 4293. Instead he relied upon a fact memorandum applied by counsel for the Venezuelan government, and ignored a memorandum previously submitted by petitioner's counsel. He thus read only one party's analysis of the evidence. In his own words, "No, I haven't read all of the evidence. I simply took the counsel's analysis of the evidence."

Such failure to read the record is particularly significant in a situation where the preceding magistrate may have lacked jurisdiction over the case by virtue of his expired assignment and where that magistrate had passed upon the critical objections and motion addressed to the competency of the demanding government's evidence. The very least that was necessary to cure the defects that attended Judge Mathes' participation was a thorough, first-hand reading of all that was in evidence before him. Only in that way could Judge Whitehurst be sure that, on the basis of what *he* considered to be competent evidence, probable cause had in fact been shown. His duty was to make a judgment based on the competent legal evidence actually

before him, rather than one based on an argumentative lawyer's memorandum. *Fernandez* v. *Phillips*, 268 U.S. 311.

In this context the principle "that one who decides must hear, or in the case of written testimony, read." *N.L.R.B.* v. *Botany Worsted Mills*, 106 F. 2d 263, 265 (C.A. 3), becomes relevant. The full hearing promised by § 3184 means at least that the evidence has been received, read and weighed by the trier of the facts, helped as he may be by subordinates and by briefs and memoranda. See *Morgan* v. *United States*, 298 U.S. 468, 480-481.

The frank admission on the record that he had not read all the evidence in support of the financial crimes overcomes any statement in the certification that Judge Whitehurst based his conclusions "upon consideration of all of the evidence submitted." On that basis alone petitioner was denied a full and fair hearing.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted and the judgment below reversed with directions to release the petitioner on the requested writ of habeas corpus.

Respectfully submitted,

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March 28, 1963.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19507

MARCOS PEREZ JIMENEZ, *Appellant*,

versus

MANUEL ARISTEGUIETA, *Intervenor-Appellee*,

and

JOHN E. MAGUIRE, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(December 12, 1962)

Before JONES and BELL, Circuit Judges, and ESTES, District Judge.

ESTES, District Judge: This is an appeal from the judgment of the United States District Court for the Southern District of Florida, Judge Wm. A. McRae, Jr., dated August 23, 1961, dismissing the original and amended petitions for habeas corpus filed by appellant, Marcos Perez Jimenez, and discharging the original and amended orders to show cause issued on the petitions for habeas corpus. The petitions for habeas corpus incorporate by reference the entire file in an international extradition proceeding under 18 U.S.C. § 3184 et seq., filed in the United States District Court for the Southern District of Florida, Miami Division, on August 24, 1959, by Manuel Aristeguieta, Counsel General of the Republic of Venezuela, on behalf of appellee, the Republic of Venezuela (Venezuela), in which the return to Venezuela of appellant, a former president of Venezuela, now in Miami, Florida, is sought under the Treaty

of Extradition between the United States and Venezuela (43 Stat. 1698).[1]

Appellant's amended petition for habeas corpus under 28 U.S.C. § 2241 asserts that the extradition file discloses defects which made unlawful both his commitment to custody and his detention under orders entered therein by Chief Judge George W. Whitehurst of the United States District Court for the Southern District of Florida.

Appellee's return to the order to show cause justified appellant's commitment and detention on the basis of the propriety of Judge Whitehurst's orders, and urged that the extradition file disclosed no defects cognizable upon a petition for writ of habeas corpus.

---

[1] The first warrant of arrest was issued August 24, 1959 by Judge Joseph B. Lieb, who commanded the appellant to be brought before him. The appellant was not brought before Judge Lieb, however, but was brought before Judge Emett C. Choate, who released him on bond on August 25, 1959. A motion to quash the warrant of arrest was brought, not before Judge Lieb, but before Judge William C. Mathes. Judge Mathes held hearings before he quashed Judge Lieb's warrant of arrest on September 24, 1959. On the same day Judge Mathes also issued his own warrant and permitted Venezuela to file an amended complaint "as sworn to on September 11, 1959" in a hearing "before this court . . . and signed in the presence of this court." This complaint attached supporting documents including the order of the Federal Court (now the Supreme Court of Justice) of the Republic of Venezuela for the arrest of appellant and its ruling that there is probable cause to believe the appellant guilty, that Court's determination that extradition of the appellant be sought from the Government of the United States, and copies of correspondence between Venezuela and its representatives, on the one hand, and the State Department of the United States on the other hand, including the request on behalf of Venezuela for the appellant's extradition

On October 21, 1959, Venezuela filed and served on appellant "the original extradition documents" duly authenticated which included charges by the Attorney General of Venezuela, the finding of the highest court of that country that the charges and evidence established cause for prosecution and arrest, the warrant and arrest of that court and a substantial quantity of evidence submitted to that court.

No testimony being offered, after argument of counsel Judge McRae entered the judgment which is the subject of this appeal, holding as a matter of law that the pleadings and papers before him disclosed no cause for issuance of the writ of habeas corpus.

The extradition proceeding was initially heard by Judge William C. Mathes, of the United States District Court for the Southern District of California, sitting in Miami by designation. On March 8, 1960 Judge Mathes permitted the filing of Venezuela's Second Amended Complaint, issued a new warrant for the arrest of appellant returnable "before me", and "with the consent of both plaintiff and defendant" continued appellant's release on bond previously posted. Thereafter the extradition case proceeded before Judge Mathes until Venezuela closed its evidence, all of which was documentary. Appellant's motion to dismiss was denied by Judge Mathes "without prejudice to a renewal of it at the close of the evidence."

In accordance with an order of the Judicial Council of the Fifth Circuit of October 7, 1960, for assignment "to some other judge" of any "unfinished business" of Judge Mathes, Chief Judge Whitehurst ordered the extradition case assigned to himself on March 6, 1961, and proceeded with hearings therein.

The extradition proceeding was concluded by orders entered by Judge Whitehurst, under 18 U.S.C. § 3184, finding that the proof did not establish probable cause on the charges of murder and participation in murder. He further found that probable cause had been shown as to each of the financial crimes which were separately and independently alleged in plaintiff's Second Amended Complaint and that the acts charged constituted crimes named in the specified provisions of the Treaty of Extradition, and he committed the appellant to the custody of the appellee United States Marshal to await the action of the Secretary of State under 18 U.S.C. § 3186. The order of commitment

was entered by Judge Whitehurst on June 16, 1961. His findings and order of certification to the Secretary of State, entered June 23, 1961, attach a copy of the Second Amended Complaint in the extradition proceeding, to which certain sections of the certification order specifically refer.

Venezuela's Second Amended Complaint, upon which the extradition proceeding and orders under attack were based, charged appellant, chief executive of Venezuela (first as a member of a three-man junta, then as provisional President, and later as President), having legal responsibility for the administration of the funds and contracting authority of Venezuela, with two distinct groups of crimes committed in Venezuela during the years 1948-1958, the first group composed of four charges of murder and participation in murder as an accessory before the fact, the second group comprised financial crimes for his own private personal gain. The financial crimes are separately and independently charged in the complaint and are based on certain alleged transactions briefly summarized as follows:

1. The appellant secured commissions or kickbacks in ten specific instances on Venezuelan Government contracts, some of which the appellant himself had executed.

2. Through a "front" or alter ego the appellant secured a portion of the compensation paid by the Venezuelan Government for two tracts of land expropriated by decrees promulgated by him.

3. By his twenty per cent ownership of EVICSA, a construction company, the appellant secured a portion of the compensation paid by the Venezuelan Government on construction contracts with the appellant's Ministry of Development, with the connivance of two of his ministers, one of whom was head of that ministry.

4. The appellant secured improvements on and maintenance of his private, personal estate at public expense at specified times.

The charges of financial crimes allege that the transactions numbered 1 through 4 above make appellant guilty of embezzlement or criminal malversation by a public officer as provided in paragraph 14 of Article II of the Treaty, guilty of fraud or breach of trust as provided in paragraph 20 of Article II of the Treaty, and that the transactions numbered 1 through 3 above make him guilty of receiving money or valuable securities knowing the same to have been unlawfully obtained as provided in paragraph 18 of Article II of the Treaty.

The same charges are pending in the Supreme Court of Justice (formerly the Federal Court), the highest court of Venezuela, upon petition of the Attorney General of Venezuela with a substantial quantity of supporting evidence. The Supreme Court of Justice determined that if the charges are proved they would constitute violations of the penal code of Venezuela and that such charges are crimes specified in the Treaty of Extradition Article II, paragraphs 14, 18 and 20; found that good cause had been shown for prosecution and issued its warrant of arrest. The proceedings before the Supreme Court of Justice, with a substantial amount of evidence from its record—all documentary—were transmitted to the United States through appropriate diplomatic channels. Venezuela invokes these Treaty provisions in its complaint and requisition for surrender of appellant.

Appellant contends that Judge McRae erred in not discharging appellant from custody on the grounds that: (1) Judge Whitehurst did not have jurisdiction to conduct the extradition proceeding, (2) appellant was not accorded due process of law in the proceeding before Judge Whitehurst, sitting as extradition magistrate, (3) the acts for which ap-

pellant's extradition is sought are acts in the exercise of sovereign authority or acts of state the legality of which the judicial authorities of the United States have no authority to determine, (4) failure of the extradition magistrate to determine whether the claim for extradition was for any crime or offense of a political character or for acts connected with such crimes or offenses, (5) the decision of Judge Whitehurst was not based on legal competent and adequate evidence, (6) the alleged financial crimes were not within the Treaty of Extradition, and (7) the extradition magistrate was without jurisdiction by virtue of Article XII of the Treaty of Extradition, inasmuch as the Venezuelan government had failed to lay legal evidence of criminality before the extradition magistrate within the two months prescribed by the Treaty.

I.

Appellant first urges that Judge Whitehurst did not have jurisdiction to conduct the extradition proceeding because the warrant of arrest was made returnable before Judge Mathes—not Judge Whitehurst, contending that the statute (18 U.S.C. § 3184) and the Treaty (Article XII) authorize only that particular justice, judge or commissioner who issues the warrant of arrest or who is "designated in the warrant of arrest" to hear and consider the evidence of criminality. Section 3184 authorizes "any justice or judge of the United States or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any state" upon complaint made under oath, to "issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner to the end that the evidence of criminality may be heard and considered."

The Section continues that if on such hearing he deems the evidence sufficient "he shall certify the same, together with a copy of the testimony taken before him, to the Secre-

tary of State". While a literal reading of the language quoted might be susceptible of appellant's contention that only the magistrate issuing the warrant may hear and consider evidence of criminality, this language is equally consistent with a construction which would permit any authorized justice, judge or commissioner to issue a warrant and that the accused may be brought before "such justice, judge or commissioner", meaning *any* justice, judge or commissioner authorized to hear and consider evidence of criminality.

The literal construction urged by appellant has been rejected in *Grin* v. *Shine*, 187 U.S. 181, where a United States District Judge issued a warrant of arrest in extradition making the warrant returnable before a United States Commissioner. The commissioner's jurisdiction was challenged on the ground, among others, that the warrant was required to be made returnable before the judge who issued it. The Supreme Court stated:

> "It may be said that technically the warrant should be made returnable before the magistrate issuing it, but where it is made returnable before another officer, having the same power and jurisdiction to act, we do not think it is fairly open to criticism." (Pp. 187-188)

In *Pettit* v. *Walshe*, 194 U.S. 205, 219, the Supreme Court held it was proper to bring the accused before an authorized commissioner in Indiana to hear and consider evidence of criminality, instead of before the United States Commissioner in New York who issued his warrant of arrest in extradition. This case supports the more reasonable construction of the statute that *any* justice, judge or commissioner authorized to act may hear and determine evidence of criminality, notwithstanding that he is not the same justice, judge or commissioner who issued the warrant of arrest.

Appellant's attempt to limit the holding in *Grin* v. *Shine* to mean only that the warrant may be returnable either before the warrant-issuing magistrate or before another magistrate specifically "designated in the warrant" is not convincing. We think *Grin* and *Pettit* mean that any judicial officer in the class authorized by the statute may hear evidence of criminality after a warrant is issued.

The narrow construction appellant urges would place undue technical burdens of procedure on foreign countries seeking the surrender of fugitives not contemplated by the Treaty which was made

> "to facilitate the course of punitive justice and to limit the crimes which may be committed in their respective territories, . . .
>
> "To deliver up to justice by means of requisition duly made as herein provided any person who may be charged with . . . any of the crimes committed within the jurisdiction of one of the contracting parties and specified in Article II."

Appellant argues that the Judicial Council of the Fifth Circuit was authorized under 28 U.S.C. § 332 only to "administer the business of the courts"; that a "judge" in an extradition case is not a "court" and "the assignment of a judge to an extradition matter does not vest him with jurisdiction" since "jurisdiction is invoked only after a warrant is made returnable to him"; and that Judge Mathes never lost and Judge Whitehurst never acquired jurisdiction in the extradition case.

Appellant cites cases, including collateral proceedings in this extradition case[2] showing that jurisdiction in an

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[2] *Aristeguieta* v. *Jimenez* (5 Cir. 1960), 274 F. 2d 206, cert. granted 365 U.S. 840; *First National Bank of New York* v. *Aristeguieta*, 287 F. 2d 219 (5 Cir. 1960), cert. granted 365 U.S. 840; *Jimenez* v. *Aristeguieta*, 290 F. 2d 106 (5 Cir. 1961).

extradition matter is vested in justices, judges or commissioners, and not "in courts". These cases relate to discovery motions and only determine that the jurisdiction of appellate courts has been confined to review of certain orders and judgments of "courts" and does not extend to review of the extradition "judge's" findings. This extradition proceeding was "the business of the courts" and Judge Whitehurst's assignment to hear the evidence of criminality under the order of the Judicial Council of the Fifth Circuit and Chief Judge Whitehurst's order was a proper exercise of their authority. The reassignment did not constitute any attempt to review any action of Judge Mathes as extradition magistrate. Certainly the office of United States District Judge held by Judge Whitehurst is one that under 18 U.S.C. § 3184 has jurisdiction of extradition proceedings, and he was authorized to act.

Moreover, the orders of Judge Whitehurst of March 23, 1961 and May 2, 1961 ordering that the appellant personally appear before him for the purpose of hearing and considering the evidence, with the Second Amended Complaint actually before him, together with appellant's bond conditioned upon compliance with the orders of the court would satisfy the requirement of a warrant even as construed by appellant in this case since the purpose of the order commanding the accused to appear under 18 U.S.C. § 3184 is "that the evidence of criminality may be heard and considered." Appellant did not object to Judge Whitehurst presiding on this ground until the judge had found against him. The omission complained of provides no ground for release on habeas corpus.[3]

At argument this court *sua sponte* raised the question as to whether the Judge of a United States District Court

[3] *Stamphill* v. *Johnston*, 136 F. 2d 291, 292 (9 Cir. 1943), cert. den. 320 U. S. 1943.

Nor would such an omission be ground for objection on appeal in other types of cases. *Albrecht* v. *United States*, 273 U. S. 1, 8-10 (1927).

established under Section 2 of Article III of the Constitution called "constitutional courts" (*Ex Parte Bakelite Corp.*, 279 U.S. 438, 449; 1 Moore's Federal Practice ¶ 0.4) can be, either authorized or required to perform the functions of an extradition magistrate. Counsel for all parties agree that the constitutional judge may be so authorized. *In re Metzger*, 5 Howard (46 U.S.) 176 (1847) was cited. In that case the Judge acted at the instance of the executive before Congress, in 1848, 9 Stat. 302, made specific provision for a judicial proceeding in extradition. We have been cited to no case in which this question has been raised. We agree that the Judge of a constitutional court may be so authorized. It is unnecessary for us to decide whether such a judge could be required to act as an extradition magistrate.

II.

Appellant's second point urges that Judge McRae erred in restricting his review of the extradition proceedings on habeas corpus to the following: "(1) whether the magistrate had jurisdiction, (2) whether the offense charged is within the Treaty, and (3) whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty"; and in not determining that appellant was denied due process of law in that (1) Judge Whitehurst had not heard, examined, considered and read all of the evidence of criminality as required by Article XII of the Treaty and 18 U.S.C. § 3184, (2) Judge Whitehurst did not examine and consider separately the evidence presented to determine whether in each case there existed probable cause that a crime enumerated within the Treaty had been committed by appellant as charged, and (3) Judge Whitehurst refused appellant's request to take the deposition of Dupouy.

The standard applied by Judge McRae in conducting the habeas corpus hearing was correct. Mr. Justice Holmes in *Fernandez* v. *Phillips*, 268 U.S. 311 at 312 stated:

". . . That writ as has been said very often cannot take the place of writ of error. It is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing and *habeas corpus* is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty * * *."

All of Venezuela's evidence of criminality was documentary and was presented before Judge Mathes. It was voluminous. All of appellant's evidence (including testimony of witnesses) was presented before Judge Whitehurst. Both sides had, at the request of Judge Mathes and Whitehurst, submitted fact memoranda or analyses of the evidence. On June 16, 1961 Judge Whitehurst announced at the conclusion of extended hearings and arguments before him that probable cause had not been established with respect to the murders, but that probable cause had been established with respect to the financial crimes charged.

While discussing the form of the order of certification and findings to be entered by Judge Whitehurst on June 23, 1961, and after counsel had called to the attention of the court the provisions of paragraph 12 of the proposed order of certification finding that the evidence submitted sustains each of the charges of financial crimes according to the probable cause standard contemplated by 18 U.S.C. § 3184, Judge Whitehurst read the paragraph and stated

"All right. This, in a general way, finds that each of the specifications has been sustained. That is the general findings, that each of these specifications is supported by the evidence."

Then appellant's counsel inquired whether the judge had "read all of the evidence in connection with this?" Judge Whitehurst replied:

> "No, I haven't read all the evidence. I simply took counsel's analysis of the evidence."

From Judge Whitehurst's certification to the Secretary of State that the certification was made by him "upon consideration of all of the evidence submitted, the pleadings of the parties, the arguments of counsel, written and oral, and the orders heretofore entered herein" and other comments of Judge Whitehurst on this occasion and from a realistic view of his conduct of this proceeding we conclude that although he may not have read "all"—in the sense of every word in the enormous record before him, he did read the record and hear, examine and consider the evidence of criminality of appellant as required by the Treaty and the statute.

Appellant's contention that Judge Whitehurst did not examine and consider the evidence presented and determine in each case whether there existed probable cause that a crime was committed by appellant as charged is refuted by the above quoted statement of Judge Whitehurst that "each of those specifications is supported by the evidence" and by his certification to the Secretary of State that the evidence submitted sustains each of the charges of financial crimes separately and independently alleged in Venezuela's Second Amended Complaint according to the probable cause standard contemplated by 18 U.S.C. § 3184 and the Treaty.

In support of his contention that he was denied due process of law in Judge Whitehurst's refusal of his request to take the deposition of Napoleon Dupuoy appellant points to 18 U.S.C. § 3191 which provides that "witnesses" whose evidence is material to his defense may be subpoened on behalf of persons unable to pay the fees of "such witnesses". Section 3191 relates to the subpoening of *wit-*

nesses and *not* to *depositions*. *In re Luis Oteiza y Cortez*, 136 U.S. 330 held that the predecessor statute to Section 3191 "does not apply to documents or depositions offered on the part of the accused" and "that all the provisions of the law and the statute contemplated the production of the defendant's witnesses in person before the magistrate for examination by him." It was held in a collateral discovery proceeding in this case that 18 U.S.C. §3190 permitting the use of properly authenticated *ex parte* depositions presented by the demanding country "are not open to a defendant".[4] The accused is not entitled to introduce evidence which merely goes to his defense but he may offer limited evidence to explain elements in the case against him, since the extradition proceeding is not a trial of the guilt or innocence but of the character of a preliminary examination held before a committing magistrate to determine whether the accused shall be held for trial in another tribunal. *Collins* v. *Loisel*, 259 U.S. 309; *Charlton* v. *Kelly*, 229 U.S. 447. Even if a deposition was available the denial of appellant's belated request for the deposition of Dupuoy would not constitute abuse of the extradition judge's "judicial discretion and his judgment cannot be reviewed upon this proceeding". *In re Luis Oteiza y Cortez*, *supra*.[5] Dupuoy was in the United States. He was a party to the case in New York City opposing Venezuela's effort to secure evidence regarding appellant's funds on deposit in certain banks, and Judge Whitehurst did not deny appellant the right to offer Dupuoy as a witness.

There is no merit to appellant's contention that he was denied due process of law in the extradition proceeding.

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[4] *First National City Bank of New York* v. *Aristeguieta* Footnote 2 supra.

[5] See also *Gallina* v. *Fraser*, 177 F. Supp. 856 (D. Conn. 1959), affirmed 278 F. 2d 77 (CA 2, 1960), cert. den. 364 U. S. 851 (1960).

III.

Appellant contends that the acts with which he is charged are "acts done in the exercise of or in color of his sovereign authority and by virtue of the law of nations as stated in *Underhill* v. *Hernandez*, 168 U.S. 250, was entitled to be discharged from custody inasmuch as the judicial authorities cannot review the acts done by a sovereign in his own territory to determine illegality".[6]

Seizing upon Venezuela's characterization of appellant as a "dictator" he argues that as a "dictator" he himself would be the sovereign—the government of Venezuela—and that all his acts constituting the financial crimes with which he is charged and as to which probable cause of guilt has been found are acts of state or sovereign acts, the legality of which the Act of State Doctrine precludes an extradition judge or magistrate from adjudicating.

Essentially the Act of State Doctrine is "the principle that the conduct of one independent government cannot be

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[6] Appellant relies on Subdivision (c) (4) of 28 U.S.C. § 2241 the habeas corpus statute which provides that the writ shall extend to citizens and domiciliaries of a foreign state "in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations."

This is only a jurisdictional provision conferring no substantive right on appellant to discharge from custody merely upon allegation of jurisdictional facts. *See Horn* v. *Mitchell*, 223 F. 549, affirmed 232 F. 819 (1st Cir. 1916), appeal dismissed 243 U. S. 247.

"The Act of State Doctrine briefly stated, holds that American courts will not pass on the validity of the acts of foreign governments within their own territories . . . this doctrine is one of the conflict of laws rules applied by American courts; it is not itself a rule of International Law." *Banco Nacional de Cuba* v. *Sabbatino*, 307 F. 2d 845, p. 855.

"International law is derived indeed from the customs and usages of civilized nations, but its concepts are subject to generally accepted principles of morality whether most men live by these principles or not." Id., p. 860.

successfully questioned in the courts of another . . ." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918).

Even though characterized as a dictator, appellant was not himself the sovereign—government—of Venezuela within the Act of State Doctrine. He was chief executive, a public officer, of the sovereign nation of Venezuela. It is only when officials having sovereign authority act in an official capacity that the Act of State Doctrine applies. *Bernstein v. Van Heyghen Freres, S. A.*, 163 F. 2d 246, 249 (2d Cir. 1947), cert. den. 332 U.S. 772 (1947); *Banco de Espana v. Federal Reserve Bank*, 114 F. 2d 438, 444 (2d Cir. 1940).

Appellant's acts constituting the financial crimes of embezzlement or malversation, fraud or breach of trust, and receiving money or valuable securities knowing them to have been unlawfully obtained as to which probable cause of guilt had been shown were not acts of Venezuela sovereignty. Judge Whitehurst found that each of these acts was "for the private financial benefit" of the appellant. They constituted common crimes committed by the Chief of State done in violation of his position and not in pursuance of it. They are as far from being an act of state as rape which appellant concedes would not be an "Act of State".

A policy underlying the Act of State Doctrine is that to adjudicate the validity of an act of a foreign government under its own law in the courts of the United States would "imperil the amicable relations between governments and vex the peace of nations". *Oetjen v. Central Leather Co., supra.*

The judiciary abstains from decision in the ordinary Act of State case in deference to the executive, the branch of government charged with international relations. In a comprehensive and discriminating opinion on the Act of State

Doctrine by Judge Waterman of the Second Circuit, in *Banco Nacional de Cuba* v. *Sabbatino*,[7] it was held that

> ". . . when the executive branch of our government announces that it does not oppose inquiry by American courts into the legality of foreign acts . . . an exception to the judicial abnegation required by the Act of State Doctrine has arisen."

In this extradition case the executive branch, through its representation of the appellee United States Marshal, has manifested its desire that the judiciary act and decide this case on its merits.

Underhill v. *Hernandez* does not support appellant's claim of sovereign immunity. In that case a citizen of the United States brought an action in United States courts for damages for unlawful detention and assault in Venezuela by soldiers in the revolutionary forces in Venezuela, under the command of Hernandez. The Supreme Court held that Hernandez, as a military commander representing a *de facto* government in the prosecution of a war, was not civilly responsible for those acts; pointed out that Hernandez was not "actuated by malice or any personal or private motives"; and made it clear that its decision would have been otherwise had defendant's action been differently motivated, as in the case here. Judge Whitehurst expressly found that the acts of appellant establishing probable cause of guilt of the financial crimes were "for the private financial benefit of the defendant".

The very reason for this extradition case is that the United States has agreed with Venezuela for the extradition of persons charged with crimes enumerated in the Treaty. This Treaty deals expressly in paragraph 14 of Article II with embezzlement or criminal malversation by public officers. Appellant notes that a public officer is one

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[7] 307 F. 2d 845, footnote 6.

who exercises "in part sovereign power".[8] The two governments intended the tribunals to act when the accused is a public officer charged with crimes enumerated in the Treaty. The acts constituting crimes charged for which the extradition of appellant is sought are not "acts of Venezuela" as in *Hernandez*, and the Act of State Doctrine is no bar to this extradition proceeding or justification for the discharge from custody of appellant.

IV.

Even though Judge Whitehurst found that the evidence failed to connect appellant with the murders and that it was unnecessary to determine whether or not these crimes were of a political character, appellant contends that Judge Whitehurst also should have made a finding as to whether the murders were political crimes and found that the murders were political and that the financial crimes were "acts connected with such (political) crimes or offenses" within the meaning of Article III of the Treaty because they were joined in the same complaint with the murders. He argues that the word "claim" in Article III (that "the provisions of this convention shall not import claim of extradition" for political offenses) refers to the extradition complaint and that if any crime or offense contained in the complaint is of a political character or is an act connected with a political crime or offense, the entire "claim" must be denied, notwithstanding the absence of any relationship of the several crimes or offenses with each other. Article III speaks of "*acts* connected with" political crimes and not of "charges" in a legal document. The necessary connection is between such acts or events and other acts or events. It is not the connection affected by charges being in the same legal paper.

Since appellant had no connection with the murders charged in the complaint, those acts could not be political

[8] Appellant's Brief p. 139, Note*

acts or crimes attributable to appellant and whether or not the homicides were political crimes by those who committed them can have no bearing on the appellant.

The murders are no longer in the case.

Judge Whitehurst's decision that the financial crimes were not political was based upon the evidence and is not reviewable here. Cf. *Ornelas* v. *Ruiz*, 161 U.S. 502, 509.

In *In re Ezeta*, 62 F. 972, five separate extradition complaints charging five persons with murder, attempted murder and robbery were heard and considered in one proceeding in which one final order was entered. One defendant, Cienfuegos, was charged with three crimes; two murders and an attempted murder. The extradition magistrate held that the crimes charged, save the attempt to murder, "were all committed during the progress of actual hostilities between the contending forces . . . against the active operations of a revolutionary uprising", *Id.* p. 997, and were therefore political crimes immune from extradition, but the attempted murder occurring before the rebellion, was "free from any political aspect", *Id.* 986, and the magistrate committed Cienfuegos for extradition for the non-political crime of attempted murder.

The fact that there were five separate complaints in *Ezeta* and one in the present case is a difference of form and not of substance.

Nothing in *Karadzole* v. *Artukovic*, 247 F. 2d 198 (C.A. 9, 1957) reversed, 355 U.S. 393, suggests that a finding of whether or not an alleged offense is political must be made when no probable cause of guilt of the offense has been found. This case supports our view that, where several offenses are charged and one or more may be political, extradition may nevertheless follow for those which are not political. The memorandum from the Secretary of State[9]

[9]Part of which appears in the note on p. 94 of Appellant's Brief and all of which is set forth in the Appendix to the Brief of Appellee John E. Maguire.

submitted in the *Artukovic* case expresses the Secretary's opinion that no valid reason exists for not allowing an extradition hearing to take place since it could not "reach the conclusion that *all* of the acts alleged by the Yugoslav government to have been committed by Artukovic are necessarily of a 'political character' merely on the basis of the pleadings" and "that it does not appear on the face of the pleadings that *all* of the offenses which Artukovic is therein alleged to have committed were necessarily connected with such struggle for power." The State Department memorandum comments that while there is a suggestion in the indictment that the acts of Artukovic constituted war crimes, it is nevertheless the opinion of the Department "that some of the murders alleged to have been committed might constitute 'murder within the terms of the extradition Treaty here involved'". Implicit in the Supreme Court's per curiam order vacating the judgment of the Court of Appeals and remanding the case for hearing under 18 U.S.C. § 3184 is a holding that even if *some* crimes charged in a single complaint are political, a hearing that may result in a finding of extraditability shall nevertheless be had under Section 3184, where the complaint may include other crimes that are non-political.

There is no evidence that the financial crimes charged were committed in the course of and incidentally to a revolutionary uprising or other violent political disturbance.

Venezuela seeks the surrender of appellant by the executive officers of the United States (who must ultimately determine whether fugitives shall be surrendered) for trial of appellant on the financial crimes only. The claim of extradition for appellant, within the meaning of the Treaty, is not based on any crime or offense of a political character or on acts connected with such crimes or offenses. Judge McRae did not err in failing to remand the extradition proceedings for further findings.

V.

Judge Whitehurst's finding that the evidence was sufficient to sustain the charges specified, as certified to the Secretary of State, was based upon legal, competent and adequate evidence under 18 U.S.C. Sec. 3190. A *prima facie* case was established by the filing of the charges by the Attorney General of Venezuela, the findings of the highest court of that country that the charges and evidence established cause for prosecution and arrest, the warrant of arrest, and a substantial quantity of evidence submitted to the Supreme Court of Justice of Venezuela. *First National City Bank of New York* v. *Aristeguieta*, 287 F. 2d 219, 227 (2 Cir., 1960), cert. granted 365 U.S. 840.

The record shows that appellant, in November, 1948, was a young lieutenant colonel in the Venezuelan army, of very modest means. By a coup d'etat, appellant and two other lieutenant colonels established a three-man military junta, which was to rule in accordance with the Constitution and laws of Venezuela. As a member of the Junta, the appellant was required by law to file a statement of his assets upon taking office. His sworn statement, filed on March 14, 1949, showed that he and his wife then possessed total net assets equivalent to $31,343.28.

In the succeeding nine years the record discloses that appellant was enriched by more than $13,000,000 in excess of his opening net worth and his legitimate compensation. All during this period the laws of Venezuela prohibited anyone in appellant's position from engaging in commercial transactions with the nation, directly or indirectly. Evidence of Appellant's financial dealings was found in a suitcase which he left behind when he hastily fled Venezuela, on January 23, 1958. The suitcase bore the initials of appellant's wife "F. P. J.," and contained securities, title deeds, banking documents, personal memoranda, currency, and a major general's uniform. That the suitcase and its contents belonged to appellant is clear from a radiogram

sent by appellant's wife from the Dominican Republic, appellant's first stop in his flight from Venezuela, and from a letter he wrote on October 24, 1958, from Miami, Florida.

The record reflects that Dr. Napoleon Dupouy was an intimate and close associate of appellant; that he exerted a strong influence in connection with government contracts; that he reported regularly to appellant and received commissions on government contracts which were shared with appellant. Papers and memoranda in the handwriting of Dupouy and appellant, found in appellant's suitcase, evidence the fact that appellant received commissions or "kickbacks" in the ten specific instances alleged in the second amended complaint.

Dupouy was nominal president of a construction company, Empresas Champenon Bernard de Venezuela, S. A., a subsidiary of the French firm Champenon Bernard. On September 12, 1950, Champenon Bernard entered into a contract with the Venezuelan government for the construction of three viaducts on the Caracas-LaGuaira expressway. Dupouy received as his commission 250,000 bolivares, which the written memorandum reflect that he shared equally with appellant.

On March 18, 1949, the appellant, as Minister of Defense, contracted with the Swedish armaments manufacturer Aktiebolaget Bofors for cannon, guns, parts and ammunition for the amount of $2,358,060. Evidence from appellant's suitcase reflects that he received $58,951.50, which is precisely 2½ per cent of the Bofors contracts.

The memorandum written in Dupouy's hand found in appellant's suitcase evidences that appellant received $19,136.25 on a government contract of June 30, 1950, and $11,983 plus $5902 "to be delivered," totaling $17,885, on a contract of December 15, 1950.

Appellant, as Minister of Defense, on July 24, 1951 contracted with the British firm Vickers-Armstrong (Ship-

builders), Ltd. for the construction of a destroyer, "Aragua," for the amount of Lb. 2,637,000. A memorandum by Dupouy evidences the fact that appellant received $168,979.

In connection with a contract for a ground-to-air communications system for 47 airports in Venezuela with International Standard Electric Company of New York, at a cost of $2,948,754, the evidence shows that appellant received $60,000 through checks from one Virgil C. Applewhite, who was vice-president of a Caracas firm which did preliminary work on the communications contract.

A handwritten memorandum prepared by Dupouy, found in appellant's suitcase, indicated that appellant received $785,000 on the purchase of six destroyers from the Italian firm of Ansaldo, S. A.; $190,272 on a contract for the purchase of three Viscount aircraft, spare parts and spare engines; $258,744 on the purchase of 40 tanks with spare parts and ammunition from two French concerns; and $170,175 on the purchase of boats by the government of Venezuela.

The accountings and memoranda found in appellant's suitcase, in Dupouy's and appellant's own handwriting; and the depositions in the record establish probable cause that appellant unlawfully received commissions or kick-backs through Dr. Napoleon Dupouy in the ten instances alleged in the Second Amended Complaint.

The record shows that appellant, through a close associate, Fortunato Herrera, and a corporation called Polinversiones, received a portion of the compensation paid by the Venezuelan Government for two tracts of land expropriated by decrees promulgated by appellant. One of the transactions involved the property of a Mrs. Carmen Rafaela Agreda de Jiminez, which the government was taking over pursuant to a decree issued by appellant on August 15, 1952. In 1950 Mrs. de Jiminez had offered to sell the property

to the government for B's 8,500,000 and on September 5, 1952 again inquired about compensation for her land. Unable to secure the compensation due her, she gave an option to her attorney, Ascanio, to purchase the property for B's 10,000,000. Ascanio sought out Herrera, who assured him and Mrs. de Jiminez that his friendship with appellant would enable him to solve their problem. The official government appraisal of the property was B's 13,320,210.50. The government paid Mrs. de Jiminez with interest-bearing obligations, and Mrs. de Jiminez turned over the amount in excess of B's 10,000,000 to Herrera.

In the acquisition of land for highway construction Herrera acquired for Polinversiones an option from Industrial del Carton for the purchase of 40,304 square meters of land at B's 30 per square meter. The land was subsequently appraised by the government at B's 120 per square meter. Thus Polinversiones received a profit of B's 3,625,360 in less than a year on an investment of B's 1,209,120. It is clear from the evidence that appellant shared with Herrera in the profits of Polinversiones.

Appellant owned 20% of the stock in a construction company known as Empress Venezuelana de Ingeniera y Construccion, S. A., called by its initials, EVICSA. This company, on an initial capital investment of B's 500,000, earned profits of B's 6,713,223.96 between 1954 and 1958, largely on six government construction contracts.

The record reflects that appellant used on his private estate services of gardners and other workmen on the public payroll and that a government agency drilled a well at appellant's El Penon estate.

The evidence was competent under 18 U.S.C. § 3190, which makes admissible, and therefore competent, documents submitted by the demanding government that satisfy certain specifications. Section 3190 provides that documents authenticated by the demanding government's an-

thorities, so as to be admissible for similar purposes in tribunals of the demanding government, "shall be received and admitted in evidence" at an extradition hearing in this country "for all the purposes of such hearing"; and the certification of the principal United States diplomatic officer in the demanding nation "shall be proof" that the documents are so authenticated.

It has been held by the Supreme Court and the lower federal courts that "competent evidence to establish reasonable ground is not necessarily evidence sufficient to convict, nor only such as can pass technical rules governing the admissibility of evidence in criminal trials." *U. S. ex rel. Klein* v. *Mulligan*, 50 F. 2d 687, 688 (2 Cir. 1931), cert. den., 284 U.S. 665 (1931), and the cases cited therein.

With respect to the evidence upon which the extradition magistrate acted, it must be remembered that the extradition magistrate merely determines probable cause, making an inquiry like that of a committing magistrate and no more. *Benson* v. *McMahon*, 127 U.S. 457, 463 (1888). Probable cause was given its classic definition, on April 1, 1807, by Chief Justice John Marshall, sitting as committing magistrate in the treason prosecution of Aaron Burr. He held that he should not require evidence to convince himself that the defendant was guilty, but only that "furnishing good reason to believe that the crime alleged had been committed by the person charged with having committed it."[19]

The evidence of appellant's enrichment, with no proof of any lawful source of the funds, when considered with the evidence of appellant's transactions with Dupouy, Herrera, Polinversiones, EVICSA, and others is sufficient to warrant the finding that there was reasonable ground to believe the accused guilty of the financial crimes charged.

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[19] *United States* v. *Burr*, 25 Fed. Cas. 2, 12 (No. 14692a) (C.C.D. Va. 1807). Beveridge, *The Life of John Marshall*, Vol. III, p. 376.

VI.

The crimes charged to appellant as to which probable cause has been found are offenses extraditable by Article II of the Treaty of Extradition. The record is clear that these charges are, if proved, crimes in the demanding nation, that question having been determined by the highest court of Venezuela. It is significant in this regard that the charges come here as a result of proceedings before the Supreme Court of Justice of Venezuela.

The crimes as to which probable cause has been shown are within Article II, paragraph 14, of the Treaty—embezzlement or criminal malversation—which provides for the extradition of persons charged with:

> "14. Embezzlement or criminal malversation, committed within the jurisdiction of one of the parties by public officers or depositaries, where the amount embezzled exceeds 200 dollars in the United States of America or B. 1.000 in the United States of Venezuela."

Criminal malversation includes a broad category of corrupt official practices. Webster's New International Dictionary defines the word "malversation" thus: "Evil conduct; fraudulent practices; misbehavior, corruption, or extortion in office." P. 1490 (2d ed. 1957). The Oxford English Dictionary lists two current meanings: "corrupt behaviour in an office, commission, employment, or position of trust"; and "corrupt administration of something"—and gives a number of instances of the use of the word in such broad senses, beginning in 1549 and continuing through the nineteenth century. 6 O.E.D. 94 (1933)

Black's Law Dictionary sets out the accepted definition:

> "In French law, this word is applied to all grave and punishable faults committed in the exercise of a

charge or commission, (office,) such as corruption, exaction, concussion, larceny." P. 1112 (4th ed. 1951).

There is evidence showing that appellant, as chief executive of Venezuela, used his position of power and authority to divert funds and services belonging to Venezuela to his own use and benefit. The offenses as to which probable cause has been certified constituted "embezzlement or criminal malversation."

The crimes as to which probable cause has been shown are within Article II, paragraph 20, of the Treaty—fraud or breach of trust, which provides for extradition of persons charged with:

> "20. Fraud or breach of trust by a bailee, banker, agent, factor, trustee, executor, administrator, guardian, director, or officer of any company or corporation, or by any one in any fiduciary position, where the amount of money or the value of the property misappropriated exceeds 200 dollars in the United States of America or B. 1,000 in the United States of Venezuela."

The phrase "fraud or breach of trust" by an "agent . . . or by any one in any fiduciary position," is very broad and covers the great variety of offenses alleged in this case. As chief executive of Venezuela, appellant was under a duty to supervise the contracting and other financial affairs of the nation as a public trust. The evidence shows that appellant, through arrangements with Dupouy, received a cut on government contracts; through a front man, Fortunato Herrera, engaged in self dealing; through his secret interest in EVISCA, received unlawful gains; and through the use of government labor and services on his private estate, failed to discharge the public trust which was imposed upon him.

Except for the improvements upon appellant's estate, the crimes as to which probable cause has been found are within

Article II, paragraph 18 of the Treaty—receiving—providing for extradition of persons charged with:

> "18. . . . receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained, where the amount of money or the value of the property so . . . received exceeds 200 dollars in the United States of America or B. 1,000 in the United States of Venezuela."

The phrase "receiving any money or valuable securities . . . knowing the same to have been unlawfully obtained" reaches thirteen of the fifteen alleged acts. In the ten Dupouy contract "kick-backs", the two Herrera land frauds, and EVICSA the evidence shows that appellant received money or valuable securities knowing the same to have been unlawfully obtained.

VII.

Appellant contends that the extradition magistrate was without jurisdiction by virtue of Article XII[11] of the Treaty

[11] "Article XII.

> "If when a person accused shall have been arrested in virtue of the mandate or preliminary warrant of arrest, issued by the competent authority as provided in Article XI hereof, and been brought before a judge or a magistrate to the end that the evidence of his or her guilt may be heard and examined as hereinbefore provided, it shall appear that the mandate or preliminary warrant of arrest has been issued in pursuance of a request or declaration received by telegraph from the Government asking for the extradition, it shall be competent to hold the accused for a period not exceeding two months, so that the demanding Government may have opportunity to lay before such judge or magistrate legal evidence of the guilt of the accused, and if at the expiration of said period of two months such legal evidence shall not have been produced before such judge or magistrate, the person arrested shall be released, provided that the examination of the charges preferred against such accused person shall not be actually going on." 43 Stat. 1698, 1705.

because appellee failed to lay befor the extradition magistrate legal evidence of the appellant's guilt within the two months prescribed by the treaty.

The two-month limitation of Article XII of the Treaty is inapplicable, for by its terms the provision relates only to an arrest resulting from a telegraphic request. This extradition case was not initiated by a telegraphic request, but by a sworn complaint filed on August 24, 1959 in the United States District Court. Even if applicable, Article XII was complied with, for the original extradition documents were filed on October 21, 1959, less than two months after appellant was first arrested, on August 25, 1959.

The Second Amended Complaint was filed on March 8, 1960, and a new warrant of arrest was issued and executed the same day. Almost all of the evidence of appellee was on file by April 9, 1960, well within the two-month period. In *Vobshin* v. *Ridenour*, 299 F. 134, 137-38 (5 Cir. 1924), it was held by this court that the period prescribed by a treaty is measured from the date on which the defendant is arrested on the basis of the complaint on which the hearing is held. It is therefore evident that the two-month limitation period of Article XII was not exceeded on either of the two warrants.

The record contains no reversible error and the judgment of the District Court dismissing the appellant's petition for habeas corpus and discharging the orders to show cause issued thereon is hereby AFFIRMED. The mandate of the Court will issue forthwith.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 10,662-M-Civil

MARCOS PEREZ JIMEÑEZ, *Plaintiff*,

v.

THOMAS H. TRENT, United States Marshal, *Defendant*,

and

MANUEL ARISTEGUIETA, *Intervenor*.

AFTERNOON SESSION

August 23, 1961, 4 o'clock p.m.

(Pursuant to adjournment the following proceedings were had:) [Tr. 238-243]

The Court [JUDGE WILLIAM A. MCRAE, JR.]:

Gentlemen, the Court is prepared at this time openly to announce the determinations which have been made in this case.

I have sketched out an order which I shall dictate into the record:

This case came on for hearing before the Court on August 22nd and August 23rd of 1961, on the following pleadings:

Amended Petition for Writ of Habeas Corpus, filed by Marcos Perez Jimenez on July 29, 1961, to inquire into his detention and restraint of liberty by the United States Marshal for the Southern District of Florida.

Order to show cause directed to the said United States Marshal, filed on July 18, 1961.

Answer of said United States Marshal, filed on August 10, 1961.

Answer of Intervenor, Manuel Aristeguieta, Consul General of the Republic of Venezuela, filed on August 10, 1961.

Petitioner's traverse to intervenor's answer, filed on August 16, 1961.

Petitioner's traverse filed August 10, 1961, to the Answer of the United States Marshal to the order to show cause.

On April 13, 1961, the Petitioner, Marcos Perez Jimenez, filed his original petition for habeas corpus on the basis of which an order to show cause was entered on April 13, 1961.

This original petition and original order to show cause were in effect amended and superseded by the amended petition for habeas corpus and the order to show cause issued upon the amended petition.

The Court has given consideration to all of the pleadings and the briefs of the respective parties in the present case, and to the arguments of counsel, which have extended over the better part of two days.

The Court has also given consideration to the evidence which was before the examining magistrate in the case of Manuel Aristeguieta, Consul General of the Republic of Venezuela, plaintiff, against Marcos Perez Jimenez, defendant, in the United States District Court for the Southern District of Florida, Miami Division; being Case No. 9425-Miami-Civil, included the certification of the Secretary of State entered in that case by the Honorable George W. Whitehurst, United States District Judge, on June 23, 1961, together with the exhibits.

In the conclusions and determinations of the Court, as hereinafter specified, the Court considered itself bound by

the general principles relating to habeas corpus proceedings as set forth in the case of Fernandez versus Phillips, 268 (U.S.) 311, and, accordingly, has made inquiry

(1) As to whether the magistrate in said extradition case had jurisdiction

(2) As to whether the offenses charged are within the extradition treaty entered into between the United States of America and the Republic of Venezuela, and

(3) As to whether there was any evidence warranting the finding by the Honorable George W. Whitehurst that there was reasonable ground to believe the accused guilty as determined by him

The Court has likewise given consideration as to whether the continued enlargement on bond of the petitioner, Marcos Perez Jimenez, is proper under the facts which have been made to appear in this case; and such consideration has included the question of whether or not this Court has the power to grant to the petitioner freedom on bail and, if so, whether or not the discretion to grant bail should be exercised

At the conclusion of the arguments, the petitioner, Marcos Perez Jimenez, made oral application for continued enlargement on bail, pending further order of this Court; and the United States Marshal, by and through his attorney, made application that said petitioner be committed to the physical custody of the United States Marshal

Thereupon, upon consideration, it is ordered that

(1) The original petition for habeas corpus, filed herein on April 13, 1961, be and the same hereby is dismissed

(2) The original order to show cause issued herein on April 13, 1961, be and the same hereby is discharged

(3) The amended petition for habeas corpus, filed herein on June 29, 1961, be and the same hereby is dismissed

(4) The order to show cause on said amended petition for habeas corpus, filed herein on July 18, 1961, be and the same hereby is discharged

(5) That the bond presently posted by said petitioner, on the basis of which he is now at large, be and the same hereby is revoked and canceled

(6) The application of petitioner, Marcos Perez Jimenez for continued enlargement on bail be and the same hereby is granted until further order of Court, on the following terms and conditions

(a) That a bond with good and sufficient surety, in the lawful sum of $100,000 be forthwith filed by the petitioner Marcos Perez Jimenez with the Clerk of the United States District Court for the Southern District of Florida, Miami Division, conditioned to provide for the full and prompt compliance with the orders and judgments of this Court; such bond to run to the United States of America and to be approved by the Clerk of said United States District Court.

(b) That said petitioner shall not leave the land area of the County of Dade and State of Florida without the prior written permission of this Court, and that any violation of such condition shall be ground for immediate commitment of said petitioner and immediate revocation of said bond, and that the provisions of the present subparagraph (b) shall be expressly set forth in the said bond

(c) That in making said bond, it is to be understood that the Court expressly approves and does hereby direct that the collateral in the sum of $25,000, presently held by the said Clerk of the United States District Court for the Southern District of Florida, as security for the bond specified by the order entered herein on June 16, 1961 shall be assigned in such manner as may be approved by said Clerk and, after such assignment, such collateral shall be-

comic security, for the new bond required by the present order.

(7) That all motions pending and undisposed of herein which are not expressly dealt with by the present order be and the same hereby are denied.

Done and Ordered in Open Court this 23rd day of August, 1961.

That concludes the Order.

Now, gentlemen, there remains to be disposed of the matter of the record; and counsel and I have likewise given consideration to how that might best be managed.

In other words, we have the problem of certification to the Secretary of State. We have likewise the problem, as I assume, of making a record on appeal.

I would like to hear from counsel with reference to that matter.

Mr. Walters: Your Honor, just for clarification, I presume that your order was directed toward our appeal; and I have prepared a notice of appeal. Continued enlargement pending appeal?

The Court: I did not say "pending appeal."

Mr. Walters: I see.

The Court: I said pending the further order of Court.

Mr. Walters: I see.

The Court: That's right.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, *Plaintiff*,

v.

MARCOS PEREZ JIMENEZ, *Defendant*.

Order of Commitment

[Tr. 4261-2]

Proceedings herein having been completed subject only to the entry of the final order and it having been determined the evidence is sufficient to sustain certain of the charges under the applicable treaty, it is ORDERED that the defendant is hereby committed to the custody of the United States Marshal to await the action of the Secretary of State under Title 18, United States Code, Section 3186.

It is further ORDERED that the Clerk deliver a certified copy of this Order of Commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

DONE AND ORDERED at Miami, Florida, this 16th day of June, 1961.

GEO. W. WHITEHURST
United States District Judge

CERTIFICATION TO THE SECRETARY OF STATE

[Tr. 4316-4321]

The undersigned United States District Judge, upon consideration of all of the evidence submitted, the pleadings of the parties, the arguments of counsel, written and oral, and the orders heretofore entered herein, certifies to the Secretary of State, in accordance with 18 U.S.C. § 3184,

that he deems the evidence sufficient to sustain the charges hereinafter specified made against the defendant, Marcos Perez Jimenez, under the provisions of the Treaty of Extradition between the United States and the Republic of Venezuela, 43 Stat. 1698.

In support of this determination the following findings and conclusions are entered:

1. This case has been heard pursuant to 18 U.S.C. § 3184 upon the complaint under oath of Manuel Aristeguieta, Consul General of the Republic of Venezuela in Miami, acting on behalf of the Republic of Venezuela, charging the defendant Marcos Perez Jimenez with having committed within the jurisdiction of the Republic of Venezuela crimes provided for by the Treaty of Extradition between the United States and the Republic of Venezuela.

2. The aforesaid complaint upon oath of Manuel Aristeguieta has been amended from time to time, most recently in the Second Amended Complaint for Extradition filed herein on March 8, 1960.

3. A warrant for the apprehension of the aforesaid defendant Marcos Perez Jimenez was issued by the Honorable William C. Mathes, United States District Judge sitting by special designation in the Southern District of Florida, upon the aforesaid Second Amended Complaint. Pursuant thereto the defendant was brought before Judge Mathes, and subsequently the undersigned, to the end that the evidence of criminality might be heard and considered.

4. The defendant was personally present at all times that evidence was received and other proceedings had in this case.

5. All hearings in this case were held on land, publicly, and in a room easily accessible to the public.

6. The evidence of criminality submitted on behalf of the plaintiff consists of exhibits made up of public documents, private documents and transcribed statements of wit-

nesses, in Spanish and English translation, the originals of such papers being certified by the principal United States diplomatic officer resident in Venezuela to be properly and legally authenticated so as to entitle them to be received for similar purposes in the tribunals of Venezuela, in accordance with 18 U.S.C. § 3190.

7. Evidence on behalf of the defendant was received in the form of testimony of witnesses appearing in person, and of a copy of Decree No. 9, dated December 7, 1948, and of exhibits containing affidavits or statements and documents attached thereto, in some cases in Spanish and English translation, which were received pursuant to stipulation or without objection on the ground of their ex parte character.

8. The defendant who was apprehended and brought before the Court is the same person who is charged in the aforesaid Second Amended Complaint with having committed crimes within the jurisdiction of the Republic of Venezuela and who is the subject of criminal proceedings in the Republic of Venezuela refgrred to in such Complaint.

9. The crimes charged in the aforesaid Second Amended Complaint as to which the undersigned has determined that the evidence is sufficient were committed within the jurisdiction of the Republic of Venezuela.

10. Paragraph 15.A of the aforesaid Second Amended Complaint charges that the defendant is guilty of murder and of participation in murder as an accessory before the fact. The evidence submitted herein is insufficient to sustain such charges in that it fails to show the necessary direct connection between the defendant and the commission of such murders.

11. Paragraphs 15.B and 15.C (supplemented by Paragraph 15.D) of the aforesaid Second Amended Complaint set forth charges that the defendant is guilty of certain financial crimes, each such crime being separately and in-

dependently alleged. Each of these crimes is alleged to violate various provisions of the Venezuelan Penal Code, which were specified by the Federal Court of Venezuela in the criminal proceedings in the Republic of Venezuela referred to in such complaint. The allegations, if proved, would also constitute violations of generally similar criminal statutes in the United States. Each one of the crimes alleged constitutes embezzlement or criminal malversation by a public officer, as provided for in paragraph 14 of Article II of the aforesaid Treaty, or constitutes fraud or breach of trust by an agent or by one in a fiduciary position, as provided for in paragraph 20 of Article II of the aforesaid Treaty. Likewise such of those crimes as are specified in Paragraph 15.D (3) of the aforesaid Second Amended Complaint constitute in each case the receipt of money or valuable securities knowing the same to have been unlawfully obtained, as provided for in paragraph 18 of Article II of the aforesaid Treaty. In the case of each alleged crime the amount embezzled, misappropriated or received is more than the minimum amount specified in each of those paragraphs of Article II of such Treaty.

12. The evidence submitted herein sustains each of the charges of financial crimes so alleged, according to the probable cause standard contemplated by 18 U.S.C. § 3184 and Article I of the aforesaid Treaty. The defendant, in the several public offices he held during the period referred to in Paragraphs 15.B, 15.C and 15.D of the aforesaid Second Amended Complaint, was charged with responsibility for the administration of public funds, property and contracting authority in the Government of the Republic of Venezuela; and the evidence shows probable cause to believe that, in his administration thereof, he secured private financial benefit as alleged in such Complaint as to each such crime.

13. Full consideration has been given to the defendant's contention that his extradition is barred by Article III of the aforesaid Treaty, which provides that the provisions

of the Treaty shall not import claim of extradition for any crime or offense of a political character or acts connected therewith, and the following findings are made and conclusions reached:

(a) Upon all the evidence, each of the crimes referred to in Paragraphs 11 and 12 of this Certification was for the private financial benefit of the defendant and is not a crime or offense of a political character or an act or acts connected therewith.

(b) In view of the finding that the evidence is insufficient to sustain the charges of murder and participation in murder as an accessory before the fact, it is not necessary to determine whether such crimes or offenses are of a political character or are acts connected with crimes of offenses of a political character.

(c) A finding that the alleged murders and participation in murders as an accessory before the fact were crimes or offenses of a political character or acts connected therewith would not affect the wholly separate crimes referred to in Paragraphs 11 and 12 of this Certification. *Karadzole* v. *Artukovic*, 355 U.S. 393 (1958); In re *Ezeta*, 62 Fed. 972 (N.D. Cal. 1894).

14. There is attached to this Certification a true copy of the Second Amended Complaint for Extradition referred to herein.

15. The Clerk is directed to transmit this Certification to the Secretary of State forthwith.

The undersigned, in anticipation of this Certification, has hitherto on June 16, 1961, issued his order in the nature of a warrant, pursuant to 18 U.S.C. § 3184, committing the defendant to the custody of the United States Marshal to await action by the Secretary of State.

By separate order of this date the undersigned is certifying to the Secretary of State, in accordance with 18 U.S.C. § 3184, the evidence received in this case.

Let a signed copy of this Certification be entered in the record of this proceeding to serve as the final order herein.

DONE AND ORDERED at Miami, Florida, this 23rd day of June, 1961.

/s/ GEO. W. WHITEHURST
George W. Whitehurst
United States District Judge

CERTIFICATION OF EVIDENCE TO THE SECRETARY OF STATE

[Tr. 4321-2]

(Number and title omitted) (Filed:)

The undersigned United States District Judge hereby certifies to the Secretary of State that all the evidence received herein (including all the testimony taken before him) is included in the record in this proceeding. Such evidence consists of Decree No. 9, dated December 7, 1948, which was received in evidence by stipulation; the documents marked as Plaintiff's Exhibits 1, 1-A, 2, 3, 4, 4-A, 5, 6, 7, 8, 9, 10, 11, 12, 12-A, 14 (except that it is noted that the defendant's motion to strike pages 80-89 and 80-E—87-E of such Exhibit 14 was granted), and 15; Defendant's Exhibits 1 through 5; and the transcripts of hearing of April 24, 25 and 26, 1961.

The Clerk is directed to transmit this certification to the Secretary of State and to transmit to him the entire record in this proceeding. Let a signed copy of this Certification be entered in the record of this proceeding.

DONE AND ORDERED at Miami, Florida, this 23rd day of June, 1961.

/s/ GEO. W. WHITEHURST
George W. Whitehurst
United States District Judge

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No. 958

In the Supreme Court of the United States

OCTOBER TERM, 1962

MARCOS PEREZ JIMENEZ, PETITIONER

v.

GUY W. HIXON, UNITED STATES MARSHAL, SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,

and

MANUEL ARRIESGUIETA, CONSUL GENERAL OF THE REPUBLIC OF VENEZUELA, MIAMI, FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
LOUIS F. CLAIBORNE,
Assistant to the Solicitor General,
IRVING JAFFE,
Special Litigation Counsel,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Southern District of Florida wrote no opinion. Its order of August 23, 1961, dismissing the petitions for habeas corpus and discharging the orders to show cause appears in the transcript at pp. 130–135 and, as orally rendered, in Appendix B to the petition. The opinion

of the Court of Appeals dated December 12, 1962 (Pet. App. 1a–28a), is reported at 311 F. 2d 547.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1962. On March 8, 1963, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 29, 1963. The petition was filed on March 28, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Article III of the Constitution bars a United States district judge from sitting as a committing magistrate in international extradition proceedings as provided by 18 U.S.C. 3184.

2. Whether common financial crimes such as embezzlement and breach of trust are non-extraditable political offenses when charged against the former head of a foreign government, responsible by reason of his office for the administration of public funds, property, and contracting authority.

STATUTES INVOLVED

The pertinent portions of Article III of the Constitution, of Articles II and III of the Extradition Treaty between the United States and Venezuela, and of the extradition statute, 18 U.S.C. 3184, *et seq.*, are reprinted in the petition, pp. 4–6.

STATEMENT

Extradition proceedings were instituted against petitioner in the Southern District of Florida in August

1959. The Venezuelan Consul General, on behalf of the Republic of Venezuela, was the complainant. Petitioner was charged with complicity in the commission of four murders and with committing certain financial crimes (including, under the final complaint, embezzlement, criminal malversation, receiving money and property known to have been unlawfully obtained, and fraud or breach of trust) (Tr. 851–886). A warrant of arrest was issued by United States District Judge Lieb on August 24, 1959 (Tr. 462). Petitioner was arrested the next day and brought before United States District Judge Choate, who released him on bail (Tr. 463). A motion to quash the warrant of arrest was heard by United States District Judge William C. Mathes of the Southern District of California, then sitting in the Southern District of Florida by special assignment (Tr. 464 *et seq.*). Judge Mathes granted the motion to quash on September 24, 1959, received for filing an amended complaint, and issued a new warrant of arrest under which petitioner's release on bond was continued (Tr. 568–569, 581–583). Hearings on various motions and other preliminary matters were held before Judge Mathes. Judge Mathes was last designated by the Chief Justice to act as a district judge and to hold a district court in the Southern District of Florida "during the period * * * ending February 29, 1960, and for such further time as may be required to complete unfinished business" (Tr. 2793–2794).

On March 8, 1960, a second amended complaint was filed with Judge Mathes (Tr. 851–887) and a third

warrant of arrest was issued by him (Tr. 888–889). All of the evidence in support of the allegations in the complaint was documentary. After being translated, the documents were filed on April 9, 1960 (Tr. 972) and admitted into evidence on May 10, 1960 (Tr. 1029, 1039, 1071–1072).

Judge Mathes, by letters dated September 30, 1960 and October 4, 1960, addressed to the Chief Judge of the Fifth Circuit, withdrew from further responsibility in all Miami cases (Tr. 2796). On October 7, 1960, the Judicial Council of the Fifth Circuit, wishing "to avoid doubt as to jurisdiction or power to act", ordered "that any matters which might be considered 'unfinished business' still being or contemplated to be heard or considered by Judge Mathes under such designation shall be assigned to some other judge" (Tr. 2793–2796). On March 6, 1961, Chief Judge Whitehurst assigned this cause to himself (Tr. 2924–2925).

On April 24, 1961, Judge Whitehurst began to hear petitioner's defense (Tr. 3066). All evidence in support of the complaint had been earlier presented to Judge Mathes (Tr. 2517–2519, 2934–2935). On June 16, 1961, Judge Whitehurst determined that there was probable cause to believe the defendant guilty of the financial crimes, but found the evidence insufficient to establish his complicity in the homicides[1] (Tr. 4253–4254). Judge Whitehurst thereupon revoked petitioner's bond and committed him to the custody of the Marshal in accordance with 18 U.S.C. 3184 (Tr. 4261–

[1] The latter charges are no longer involved in this proceeding.

4262).[2] On June 23, 1961, the judge certified his findings, together with a transcript of the evidence, to the Secretary of State (Tr. 4316–4322).

On June 29, 1961, petitioner filed an amended habeas corpus petition (Tr. 63–76), initiating the proceedings sought to be reviewed here. He challenged the legality of his detention on a number of grounds, most of which are not pressed here. District Judge McRae issued an order to show cause on the amended petition; returns and responses were duly filed and the matter was heard before the judge on August 22 and 23, 1961. At the conclusion of the hearings on August 23, 1961, Judge McRae announced his order dismissing the petitions for habeas corpus, discharging the orders to show cause thereon, and enlarging petitioner under bond of $100,000 (Tr. 238–243). The Court of Appeals affirmed.

ARGUMENT

We consider primarily the two questions strenuously urged in the petition: (1) whether it is compatible with the limitations imposed by Article III of the Constitution for Congress to authorize a judge who is a member of an Article III tribunal to act as an extradition magistrate; and (2) whether the provision of our extradition treaty with Venezuela excluding political offenses immunizes the former head of state from the extradition process. In our view, both of these issues have been correctly decided and there is no occasion for review by this Court.

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[2] Petitioner was released on bond almost immediately by Judge Choate, acting in the pending habeas corpus proceeding previously instituted by petitioner on April 13, 1961 (Tr. 61).

warrant of arrest was issued by him (Tr. 888–889). All of the evidence in support of the allegations in the complaint was documentary. After being translated, the documents were filed on April 9, 1960 (Tr. 972) and admitted into evidence on May 10, 1960 (Tr. 1029, 1039, 1071–1072).

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---

[2] Petitioner was released on bond almost immediately by Judge Choate, acting in the pending habeas corpus proceeding previously instituted by petitioner on April 13, 1961 (Tr. 61).

The remaining questions, which the petitioner denominates as procedural issues, relate to the capacity of a visiting judge to entertain an amended complaint and to issue a new warrant while he is completing unfinished business, and the alleged failure of the succeeding extradition judge who committed the petitioner to consider the evidence in the case. These claims are not seriously advanced as grounds for granting the writ and are insubstantial.[3]

1. THE CONSTITUTIONAL ISSUE

Belatedly[4] and with doubtful standing to do so,[5] petitioner attempts to agitate broad questions re-

[3] There is no substance to the suggestion that this Court's grant of certiorari in *Aristeguieta* v. *First National City Bank*, 365 U.S. 840, Nos. 1 and 4, this Term, affects the questions presented by the instant petition. Those cases involve only the availability of certain compulsory process in extradition matters, the courts of appeals in both instances having denied their use to the representative of the demanding government. If this petition is denied, those issues will be mooted. Should the Court grant certiorari here, consideration of those cases should still be deferred, for if petitioner prevails on his constitutional claim the issues raised there will probably be mooted.

[4] Petitioner invokes Article III for the first time in this Court, more than three years after the event. When these questions were raised *sua sponte* by the court of appeals during the oral argument petitioner conceded the constitutionality of authorizing a district judge to act as a committing magistrate in extradition. (Pet. 9a–10a.)

[5] In contrast to the petitioner in *Lurk* v. *United States*, decided *sub. nom. Glidden Company* v. *Zdanok*, 370 U.S. 530, who claimed the benefit of a "life-and-death" judge, *id.*, at 605 (dissenting opinion of Mr. Justice Douglas), it is difficult to appreciate how this petitioner was prejudiced because he got (so he says) *more* than his constitutional due by having his case decided by an Article III judge rather than a mere commissioner.

specting the constitutional boundaries of the judicial power. But, as we view the case, those large issues are not presented here. Disposition of this matter does not require re-examination of all the decisions from *Hayburn's Case*, 2 Dall. 409, to *Glidden Company* v. *Zdanok*, 370 U.S. 530, which touch on the distinction between the functions of Article III courts and other tribunals. Nor is it even necessary to decide whether a United States District Court, as such, could constitutionally entertain an extradition petition. For present purposes, it is unimportant whether the extradition judge who handled these proceedings exercised the judicial power vested in him as a member of an Article III court or acted as a commissioner expressly authorized by Congress to hear and determine the question. We may assume that he was acting as a mere administrative magistrate and that the court itself could not have adjudicated the matter.* For, whether or not the business is judicial in the strict constitutional sense, it is conceded that Congress could assign the task to officers who do not enjoy Article III status, including state judges and commissioners. And, of course, no one disputes that Congress has purported to authorize federal judges to handle extradition proceedings. The only remaining question then is whether

* So saying, we reserve the question whether an Article III *court* might have handled the case, in the event the Court should disagree with our premise. See *Ballmann* v. *Maisan*, 197 U.S. 169; *McGrath* v. *Kristensen*, 340 U.S. 162, 167–168.

18 U.S.C. 3184 provides in pertinent part:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commis-

the magistrate in this case was constitutionally barred from acting in the premises because he is also a member of an Article III court.

There is certainly no novelty in the suggestion that individual judges may perform certain acts which the courts to which they belong might not. From the time of the First Judiciary Act of 1789 and for over a century, Justices of this Court sat as trial judges, adjudicating controversies which the Court, as such, lacked original jurisdiction to entertain under Article III. Likewise, here, the extradition statute purports to authorize a member of this Court to act as a committing magistrate, although the Court itself could not perform that function.[7a] Clearly, therefore, *all* the limitations imposed on courts by Article III

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sioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. * * *

The reference to "any justice" of this Court and to "any judge" of a state appellate court, where a quorum is required for decision (see, *e.g.*, 28 U.S.C. 1), makes it clear that the extradition function is intended to be conferred on judges and not on courts.

[7a] While there are perhaps no *constitutional* problems involved, it is noteworthy that the present assignment provisions of the Judicial Code treat most federal judges, except active members of this Court, as interchangeable without regard to the territorial or subject matter limitations on the jurisdiction of their respective courts. 28 U.S.C. 291–296.

do not inhibit the judges of such courts. The issue here is whether the restriction of constitutional courts to strictly judicial business applies with equal force to judges.

That question, it seems to us, has long since been foreclosed. Indeed, from the first, a majority of the Justices of this Court, sitting on circuit, indicated that federal judges are free to handle non-judicial matters referred to them by the Congress, provided only the reference is plainly to them as judges, and not as a court. See the Note to *Hayburn's Case*, 2 Dall. 409, 409–13. And the Court itself so stated in *United States* v. *Ferreira*, 13 How. 47–50.[*] The principle is clear: "[a] court is not a judge, nor a judge a court." *Todd* v. *United States*, 158 U.S. 278, 284. In another case, the question might arise how far a judge can stray from the constitutional role of his court, though even there the issue is perhaps one of propriety rather than constitutionality. See Hart and Wechsler, *The Federal Courts and the Federal System*, pp. 102–105. But we encounter no such difficulty here. For, if the extradition magistrate does not exercise judicial power in the strictest sense, his function is nonetheless judicial in most respects and it is one that a judge can perform without the slightest embarrassment to his court.

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[*] The only caveat raised in the Opinion, and left unresolved—whether the judge's authority to sit as a commissioner depends upon a separate presidential appointment, confirmed by the Senate, *id.*, at 50–51, is no longer in doubt. At least, no one would now suggest that such a procedure is necessary before a district judge can perform the duties of a United States commissioner. See 18 U.S.C. 3041. It is settled that Congress properly invested the court itself with power to appoint commissioners. See 28 U.S.C. 631; *Rice* v. *Ames*, 180 U.S. 371, 378.

Indeed, this Court long ago approved the assignment of extradition duties to federal judges. Even before the enactment of the first extradition statute in 1848 (9 Stat. 302), the Court sustained (*In re Metzger*, 5 How. 176, 188–189) the current procedure of referring to a district judge the question whether there is probable cause to believe the fugitive has committed an offense covered by the treaty:[*]

> The mode adopted by the executive in the present case seems to be the proper one. Under the provisions of the constitution, the treaty is the supreme law of the land, and, in regard to rights and responsibilities growing out of it, it may become a subject of judicial cognizance. * * *
>
> Whether the crime charged is sufficiently proved, and comes within the treaty, are matters for judicial decision; and the executive, when the late demand of the surrender of Metzger was made, very properly as we suppose, referred it to the judgment of a judicial officer. The arrest which followed, and the committal of the accused, subject to the order of the executive, seems to be the most appropriate, if not the only, mode of giving effect to the treaty.

Immediately after Congress formalized the procedure, the Court again ratified it. *In re Kaine*, 14 How. 103.[*] And despite the many extradition cases reaching this Court in the following hundred years, the authority of district judges to act as extradition magistrates has never been questioned since.

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[*] While the matter was there handled by a commissioner, the prevailing opinion generally approved reference to "judicial magistrates," expressly adverting to federal district judges as

Nor is it surprising that the propriety of assigning to federal judges a role in international extradition has gone so long unchallenged. For to attack that procedure after more than a century is to question the undisputed competence of Article III judges to act as committing magistrates in domestic cases. As the Court itself has repeatedly observed, there is no real distinction to be drawn between the two functions. *Benson* v. *McMahon*, 127 U.S. 457, 463; *In re Luis Oteiza y Cortes*, 136 U.S. 330, 334–335; *Charlton* v. *Kelly*, 229 U.S. 447, 459–461; *Collins* v. *Loisel*, 259 U.S. 309, 316; *Factor* v. *Laubenheimer*, 290 U.S. 276, 291.[9] The same officers are authorized to act in both instances; the same test applies; the decision in each case has the same limited finality—discharge, without prejudice to a new complaint, or temporary commitment, subject to further action by another independent agency;[10] and, for the same reason, neither order is appealable.[11]

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properly included among them. *Id.*, at 110, 115. Mr. Justice Curtis did not question the proposition. See *id.*, at 119. While the dissenters thought the matter should be referred to the Judiciary by the Executive of this country, rather than the demanding government, they did not question the propriety of assigning the task to a United States district judge. *Id.*, at 141–143.

[9] *Collins* v. *Miller*, 252 U.S. 364, 369, does not describe the commitment proceedings differently. In using the language quoted by the petitioner (Pet. 35), Mr. Justice Brandeis was speaking of the order issued by the habeas corpus judge and not a commitment proceeding either in extradition or in the usual criminal case.

[10] Until the adoption of the Rules of Criminal Procedure in 1946 (see Rule 48(a)), the Attorney General or the United States Attorney was free to dismiss a complaint after commitment. See *Confiscation Cases*, 7 Wall. (74 U.S.) 454, 457.

[11] As to the non-appealability of the extradition order, see

See 18 U.S.C. 3041. Clearly, there is no more basis for doubting the propriety of the judge's intervention in one case than in the other.

We conclude that petitioner's challenge of a power expressly conferred by Congress more than a century ago, confirmed by this Court and sanctioned by long and unquestioned practice does not present a substantial question.

2. THE TREATY ISSUE

Petitioner does not here challenge the finding of the extradition magistrate that there is probable cause to believe him guilty of the financial crimes charged. He no longer contests the conclusion that the offenses disclosed by the evidence are among the extraditable crimes described in Article II of the treaty. Nor does petitioner dispute the determination that each of the offenses was committed for his own "private financial benefit" (Tr. 4320). These factual conclusions are, in any event, insulated from collateral attack. See *Fernandez* v. *Phillips*, 268 U.S. 311, 312; *Charlton* v. *Kelly*, *supra*, at p. 457; *McNamara* v. *Henkel*, *supra*, at pp. 523, 525; *Terlinden* v. *Ames*, *supra*. Yet petitioner insists that the crimes alleged are "of a political character" and therefore excluded under Article III of the extradition treaty (Pet. 6). He does so apparently on two grounds: (1) that a former head of state, enjoying dictatorial powers, is immune from

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In re Kaine, *supra*, at 119; *In re Luis Oteiza y Cortes*, *supra* at 834; *Bryant* v. *United States*, 167 U.S. 104; *Terlinden* v. *Ames*, 184 U.S. 270, 278; *McNamara* v. *Henkel*, 226 U.S. 520.

extradition for crimes or acts committed in violation of his office, and (2) that the political character of offenses under the treaty must be viewed not as of the time of their commission, but in the light of the political relationship between the accused and those now in power and their motivation in seeking his extradition.

Neither proposition will survive its statement. It borders on the absurd to suggest that a dictator who, by abusing his position of power, commits common theft for his own advantage is insulated merely because he holds the highest office.[12] The situation might conceivably be different if the crimes were committed at a time of political upheaval and the funds were used to further a political objective. But there is no such allegation here.

Nor is there any doubt that the political character of an offense must be determined in accordance with the circumstances existing at the time the crime is alleged to have been committed. The motivation of a succeeding government in seeking the extradition of the accused cannot alter the nature of the offense. Whether the demanding government is moved by a concern for justice, by political considerations or by vindictiveness is not a justiciable issue. It is, rather, a

[12] Invocation of the Act of State Doctrine with respect to crimes committed for personal gain is difficult to understand. *Underhill* v. *Hernandez*, 168 U.S. 250. But, in any event, the claim is foreclosed by the solemn demand of petitioner's government which charges violations of its national laws. Cf. *Oetjen* v. *Central Leather Co.*, 246 U.S. 297.

question for the political department of this government and for the Secretary of State. *In re Lincoln*, 228 Fed. 70, affirmed *per curiam*, 241 U.S. 651; *Laubenheimer* v. *Factor*, 61 F. 2d 626, 628 (C.A. 7), affirmed, 290 U.S. 276; *In re Ezeta*, 62 Fed. 972, 982 (N.D. Calif.). Certainly, petitioner's fears cannot weigh in the decision of the extradition judge. Article XV of the treaty between the United States and Venezuela provides that no person shall be tried for any crime or offense other than that for which he was surrendered. This Court must assume that the demanding government, recognized by the United States as a friendly sovereign, is not subverting the treaty in asking petitioner's surrender and that it will give him a fair trial. *Glucksman* v. *Henkel*, 221 U.S. 508. See, also, *Ramos* v. *Diaz*, 179 F. Supp. 459, 463 (S.D. Fla.).

3. PROCEDURAL ISSUES

Under the broad heading of procedural issues, petitioner contends that Judge Mathes acted in this matter after the expiration of his designation and that the orders entered by him thereafter cannot stand. Judge Whitehurst's participation in the case is likewise challenged because he did not issue a new warrant of arrest and start the case anew, and also because he allegedly failed to read the record. These issues are said to arise because of uncertainty as to the constitutional capacity of a district judge to participate in Section 3184 proceedings. However, they are

not emphasized as bases for granting review and, in any event, do not merit the Court's consideration."[13]

Judge Mathes, a district judge from the Southern District of California, was assigned to the District Court for the Southern District of Florida. He was thereby invested with "all the powers of a judge" of that court and authorized "to perform any duty which might be required of a judge" of the court. 28 U.S.C. 296. The last designation covered a period ending February 29, 1960, "and for such further time as may be required to complete unfinished business." Prior to February 29, Judge Mathes had issued a warrant of arrest and conducted hearings. On March 8, 1960, while still properly sitting in the Southern District of Florida for the purpose of completing unfinished business, a second amended complaint was presented to him and he issued a new warrant of arrest. The proceedings were not begun anew, and rulings theretofore made continued in force. It is accordingly clear that the extradition proceeding over which Judge Mathes had been presiding since the preceding September was "unfinished business" properly before him until he was relieved of duty on October 7, 1960, by the Judicial Council for the Fifth Circuit. In any event, having failed to object at the earliest practicable moment, petitioner has no standing to complain at this late date. *McDowell* v. *United States*, 159 U.S. 596, 602. Judge Mathes, if not a judge *de jure* in

[13] Petitioner understandably does not claim to have been prejudiced by the change in judges. For Judge Mathes received all the evidence of the demanding government, entirely documentary, and Judge Whitehurst, who decided the matter, heard all of petitioner's

March 1960, was at least one *de facto*. As this Court pointed out in *Glidden Company* v. *Zdanok*, *supra*, at p. 535:

> * * * Although a United States Attorney may be permitted on behalf of the public to upset an order issued upon defective authority, *Frad* v. *Kelly*, 302 U.S. 312, a private litigant ordinarily may not. *Ball* v. *United States*, 140 U.S. 118, 128–129.

Petitioner challenges the participation of Judge Whitehurst in the extradition proceeding essentially on two grounds: (1) that he never issued a warrant of arrest and (2) that he did not read all of the evidence submitted on behalf of the demanding government.

The purpose of a warrant of arrest, as 18 U.S.C. 3184 makes plain, is to apprehend the person charged "that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered." On March 23, 1961, after the conclusion of a preliminary conference between the court and counsel, Judge Whitehurst fixed the date for the presentation of petitioner's evidence and ordered petitioner to be personally present in court at said hearing (Tr. 3013). This fulfilled the purpose of the statute and is plainly the equivalent of a warrant of arrest.

The contention that Judge Whitehurst did not consider all of the evidence presented by the demanding government is equally without merit. Even if petitioner is entitled to rely on an isolated comment made by Judge Whitehurst at an informal hearing on June 23, 1961 (Tr. 4293), he shows no prejudice.

There is no suggestion that counsel's summary of the evidence, which the judge quite reasonably used as an aid, was in any respect inaccurate. Nor can there be any complaint that Judge Whitehurst ignored petitioner's evidence, for, as stated, all of it was presented to him for the first time. There is no pretext for going behind the judge's certificate to the Secretary of State which recites that the decision was reached "upon consideration of all the evidence submitted, the pleadings of the parties, the arguments of counsel, written and oral, and the orders heretofore entered herein" (Tr. 4316). See *United States* v. *Morgan*, 313 U.S. 409, 421–422.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 958

Supreme Court of the United States

OCTOBER TERM, 1962

MARCOS PEREZ JIMENEZ, *Petitioner*,

v.

GUY W. HIXON, United States Marshal, Southern District of Florida,

and

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Miami, Florida, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT MANUEL ARISTEGUIETA IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 958

MARCOS PEREZ JIMENEZ, *Petitioner*,

v.

GUY W. HIXON, United States Marshal, Southern District of Florida,

and

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Miami, Florida, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT MANUEL ARISTEGUIETA IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the more than century old 18 U.S.C. § 3184, empowering a United States District Judge, on a showing of probable cause, to commit to jail an accused fugitive to await the action of the Secretary of State on a requisition by a foreign government for his surrender under a treaty of extradition, is unconstitutional under Article III of the Constitution because the Secretary, having received the judge's certification of his finding of probable cause, has discretion, in the conduct of foreign relations, ultimately to decline to surrender the fugitive.

2. Whether embezzlement of public funds and similar financial crimes, committed by petitioner, a former official of a foreign government, for his private financial benefit, constitute crimes of a political character or acts connected

with crimes of a political character immune from extradition under Article III of the Treaty of Extradition between the United States and Venezuela because when he committed his alleged crimes petitioner was the head of the foreign government rather than an official of more humble status.

3. a. Whether on the facts of this case the extradition proceeding against petitioner was "unfinished business" of a United States District Judge assigned to "perform the duties of district judge and hold a district court" in a district other than his own for a specified period "and for such further time as may be required to complete unfinished business" so as to permit the assigned judge to continue to hear the case after the specified period of his assignment expired when theretofore the proceeding had been in active litigation before him.

b. Whether petitioner, who is challenging his commitment by another judge and who never objected on this ground to the continued hearing of his case by the assigned judge, has standing to raise the foregoing question.

4. Whether petitioner was denied a fair hearing because the committing judge in an extradition proceeding may not have read all the evidentiary documents submitted in evidence by the demanding government, where substantial portions thereof related to uncontested matters or were matters of form, repetitious or immaterial, and where counsel for both parties submitted to the judge exhaustive memoranda and oral argument on all the evidence and issues in the case.

COUNTERSTATEMENT OF THE CASE

Following an extradition proceeding conducted on a complaint made on behalf of the Government of Venezuela pursuant to 18 U.S.C. § 3184, Chief Judge George W. Whitehurst of the United States District Court for the Southern District of Florida ordered petitioner committed to jail

to await the action of the Secretary of State under 18 U.S.C. § 3186. The Government of Venezuela has presented to the Secretary of State a requisition for the surrender of the petitioner to stand trial in Venezuela on charges there pending of embezzlement, criminal malversation, fraud, breach of trust and receiving money knowing it to have been unlawfully obtained. These are all crimes named in Article II of the Extradition Treaty between the United States and Venezuela, 43 Stat. 1698. By Article I of that Treaty each of the two nations agrees to "deliver up to justice . . . any person who may be charged with . . . any of the crimes specified in Article II . . . who shall seek an asylum or who shall be found within" its territories. By a petition for writ of habeas corpus in which he challenged on a number of grounds the legality of the extradition proceeding, petitioner sought release from the custody in which he was held pursuant to the extradition judge's order of commitment. The District Court for the Southern District of Florida dismissed the petition and discharged an order to show cause issued thereon. (Pet. App., pp. 29a-33a). The Court of Appeals for the Fifth Circuit affirmed the District Court's judgment in all respects. (Pet. App., pp. 1a-28a). Petitioner seeks review by this Court of the Court of Appeals' judgment.

A. The Extradition Proceeding

This respondent, the Consul General of Venezuela in Miami acting on behalf and on the instructions of his government, filed the initial sworn complaint for extradition against petitioner on August 24, 1959—nearly four years ago. (Tr. 459-61). The complaint was filed with District Judge Joseph P. Lieb of the Southern District of Florida, who on August 25 issued his warrant for the arrest of the petitioner. (Tr. 462). Apprehended, petitioner was immediately admitted to bail by Judge Emett C. Choate of that same district. (Tr. 463). He remained free on bail throughout the extradition proceeding and the ensuing

habeas corpus case until the Court of Appeals entered its judgment affirming the dismissal of his habeas corpus petition in December 1962; he was then jailed.

As amended in the manner subsequently described, the complaint charged the petitioner with two kinds of crimes, committed while he held high office in Venezuela in the period from 1948 until 1958.[1] The first category of crimes was murder or participation in murder in the deaths of four persons. The second was comprised of fifteen specific instances in which petitioner, in abuse of his office, misappropriated and otherwise unlawfully obtained funds from the public treasury of Venezuela. Petitioner does not in this Court raise any question as to the sufficiency of the evidence laid before the extradition judge in support of the charges of financial crimes; as explained hereafter, the homicides are no longer in the case. The court below adequately summarized the evidence. (Pet. App., pp. 20a-24a). Suffice it here to say that petitioner, in 1948 a man of modest means, funneled enough of the public wealth of Venezuela into his own pockets to become fabulously rich.

The charges in the extradition proceeding reflected charges pending against petitioner in the highest court of Venezuela, known until 1961 as the Federal Court and

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[1] Petitioner held power in Venezuela from November 24, 1948, until January 23, 1958. Until December 3, 1952, he was the leading member of a three-man junta. On that date, he became provisional President, and from April 19, 1953, until his government fell on January 23, 1958, he was President of Venezuela. He came to power as the result of a coup in which the legally elected government of Venezuela was ousted by the armed forces, and until July 1, 1953, he retained for himself the key position of Minister of Defense. (Tr. 1240-42, 1244, 1252-53, 2118, 2122).

Petitioner states (Pet., p. 8) that the coup that initially brought him to power took place in 1950 and overthrew a government in which the present President of Venezuela, Romulo Bentancourt, was President. That is incorrect. The date of the coup was November 24, 1948; the President of Venezuela at that time was Romulo Gallegos, legally elected the previous year as the peaceful successor to a junta of which Sr. Betancourt was a member.

thereafter as the Supreme Court of Justice. The charges were preferred by the Attorney General of Venezuela. (Tr. 1092-1128). The high court determined that there were grounds to proceed on these charges, issued its warrant for the arrest of petitioner on charges of murder and financial crimes and determined that his extradition should be requested. (Tr. 1074-90, 1129-49).[2] Extradition was necessary because petitioner had fled first to the Dominican Republic and thence to the United States. The filing of the extradition complaint followed.

On the day of his arrest on Judge Lieb's warrant petitioner moved to quash the warrant of arrest, challenging the sufficiency of it and the underlying complaint. (Tr. 464). This motion came on to be heard by Judge William C. Mathes, who was performing the duties of a district judge in the Southern District of Florida by assignment and designation of the Chief Justice. After hearing counsel on four separate days in September 1959 (Tr. 465-523, 536-55, 560-76) Judge Mathes quashed the original warrant of arrest, received an amended complaint (Tr. 524-35) and issued his warrant on that complaint. (Tr. 577-82).[3] Judge Mathes set a date in November when he was to return to Miami from his home district in California for further hearing.

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[2] The Venezuelan high court omitted from its warrant for the petitioner's arrest and its determination that his extradition should be requested the Attorney General's charge that petitioner fraudulently altered election returns in November 1952 in order to bring about his selection as provisional President. (Pet., pp. 9-10, 49 n.40).

[3] After issuing his warrant of arrest, which as noted was subsequently quashed, Judge Lieb took no further part in the case. In November 1959, while Judge Mathes was out of the district, petitioner applied to Judge Choate for an order relating to depositions, as he had in the case of bail; the order entered by Judge Choate had the effect of deferring to Judge Mathes ultimate decision on the question raised (Tr. 590-91), and Judge Choate took no further part in the proceeding.

Prior to the November hearing translation of the documents from the Venezuelan Supreme Court that had been sent to this country in support of the request for petitioner's extradition was completed, and these documents, including the court's orders and a part of the evidence on which they were based, were filed and served upon petitioner. (Tr. 583-84; see Tr. 1074-1225). Study of the documents made possible by their translation revealed that there was substantial additional evidence in Venezuela; measures to have such evidence sent to the United States were taken at once. In addition, the documents made it apparent that records of United States bank accounts of petitioner and some of his confederates would be highly relevant to the financial crimes charged and their production in evidence would curtail the amount of evidence needed from Venezuela.

An initial effort to compel production of some of those records was temporarily unsuccessful (Tr. 590-91), but at the hearing before Judge Mathes on November 23, 1959 (Tr. 605-86), he granted this respondent's motion for the issuance of subpoenas to certain banks commanding the production of the relevant records.

Also at that hearing, two amendments to the amended complaint (Tr. 591-603) were received, and a series of motions filed by the petitioner (Tr. 556-59, 584-88) were denied. (Tr. 687-91). Petitioner's counsel at this time was quite candid in stating that he would take advantage of every possible technicality (Tr. 645; see also Tr. 507-08), and he demonstrated this by objecting to the tender of the documents from the Venezuelan Supreme Court on the ground that a red ribbon attached to the United States Embassy's seal certifying the documents did not run through all the attached papers. (Tr. 632-33).[4]

At hearings before Judge Mathes in December and January it became plain that the United States bank records

[4] The documents were returned to Venezuela in order that this "error" might be rectified. (Tr. 632-41, 688-89).

would be produced, if at all, only after considerable litigation.[5] Therefore, counsel for this respondent, rather than cause a delay until the bank subpoena question was settled, undertook to reorganize and supplement the evidentiary material that was being received from Venezuela and proceed with the case on the assumption that the bank records would not be available. (Tr. 716-19). This was done. Documents were translated and reproduced and sent to petitioner's counsel at regular intervals in order that translations could be checked and to give petitioner full notice of the charges with which he was confronted. (Tr. 813-22). After agreement on translation was reached, the evidentiary documents were rearranged in logical order with fully informative tables of contents and were filed and served in April 1960; accompanied by an exhaustive Memorandum on the Facts that guided the judge to what was significant in the documents (which, in large part because of petitioner's insistence on technicalities, included many, many pages that did not need to be perused [see *infra*, p. 9, n. 8]). The memorandum also reproduced in original and translation a number of the key evidentiary documents. (Tr. 901-70).

Meanwhile, a second amended complaint was received by Judge Mathes on March 8, 1960, which spelled out in great detail the charges against petitioner. (Tr. 851-87). The evidence previously filed and served was offered and received on May 10 (Tr. 1071-72), subject to a motion to strike, which was briefed and argued and finally denied. (Tr. 2555-A). All the evidence of this respondent was submitted in documentary form pursuant to 18 U.S.C. § 3190; there were

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[5] See Aristeguieta v. Jimenez, 274 F.2d 206 (5th Cir. 1960); here on certiorari, 365 U.S. 840, as No. 1 of this Term. After the November 1959 subpoenas were ordered quashed, this respondent, with Judge Mathes' permission, moved to have the records produced as upon deposition. (Tr. 893-95). This move too was blocked. See First Nat'l City Bank v. Aristeguieta, 287 F.2d 219 (2d Cir. 1960); here on certiorari, 365 U.S. 840, as No. 4 of this Term.

no live witnesses. Petitioner then filed a motion to dismiss, which was supported by a memorandum more exhaustive than this respondent's fact memorandum, in which petitioner treated of every issue of fact and law raised by this respondent's charges and the evidence in support of them.[6] The motion was argued before Judge Mathes for three days in September 1960,[7] and at the conclusion of the hearing Judge Mathes denied the motion without prejudice to its renewal when all the evidence on both sides was in. (Tr. 2705-06).

The next step was the taking of petitioner's testimony. Despite the notice he had had and the assurances he had given as far back as March that he was diligently preparing his case (Tr. 850) and the judge's provision that the hearing of his case should begin in September (Tr. 2519; see also Tr. 1061-66), he was not ready to proceed. A further hearing therefore was set for later in the month of September. At this time petitioner presented sketchy motions to take depositions of certain persons in Europe and Venezuela, which his counsel acknowledged were inadequate. (Tr. 2557-58). Judge Mathes gave petitioner the opportunity to support his defective motions with affidavits from the prospective deponents; he advised that any such affidavits should set forth in detail and as strongly "as the truth permits" the testimony they would give, with the thought that this respondent would be put to the choice of stipulating to receipt of the affidavits themselves or going to the expense, time and labor of attending at depositions. (Tr. 2761-62, 2764). The judge also fixed a date for hearing the testimony of any witnesses petitioner might care to produce to testify in person. (Tr. 2791-93). Petitioner submitted some affidavits from witnesses in Europe on the due date Judge Mathes had fixed. (Tr. 2798-2801).

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[6] The section of this memorandum dealing with the facts of the financial crimes is reproduced at Tr. 2556-2600.

[7] Portions of the argument are reproduced at Tr. 2600-2704.

So matters stood when the parties were advised by letter to counsel from the senior district judge in Miami that Judge Mathes was relieved and the case would be given to some other judge. (Tr. 2902-03). As was later revealed, Judge Mathes late in September 1960, following a conference among the chief judges of the Fifth Circuit and Judge Mathes' home circuit, the Ninth, and the Chief Justice, withdrew from all his pending cases in the Southern District of Florida, and this action was confirmed by the Judicial Council of the Fifth Circuit. Though believing its action probably unnecessary in view of Judge Mathes' own withdrawal, the Judicial Council directed that all matters that might be considered unfinished business of Judge Mathes in Florida be assigned to another judge. (Tr. 2793-98).

Chief Judge George W. Whitehurst of the Southern District of Florida took on the case (Tr. 2924-25) and at a hearing on March 21, 1961, at which petitioner's counsel fully acquiesced in the Chief Judge's assumption of the case (Tr. 2953-54), set up the procedure for further steps in the case. (Tr. 3012-13). These included the filing of memoranda by both sides designed to assist the Chief Judge in his analysis of the bulky documentary evidence that had been submitted on behalf of this respondent (Tr. 2992-95, 3013); such filings were made.[8]

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[8] For a variety of reasons this respondent's evidence ran to 2300 pages in English translation. Many of these pages were repetitious or dealt with quite incidental matters, some of them very technical, and a great deal of the evidence was not controverted in any way. Not the least of the reasons for the bulk of the evidence was petitioner's insistence that he was going to be technical. Thus, in order to prove, for example, that government contracts were executed at particular times, at particular prices and for certain material, this respondent was led to offer the full text of many such contracts, although their detailed terms were quite insignificant. Simply to prove the existence of a corporation and the names of its founders the whole corporate charter would be included. Furthermore, the form in which the evidentiary

In addition, Chief Judge Whitehurst set a date in late April for hearing petitioner's evidence and ruling upon his motions for leave to take depositions in Europe and Venezuela. Petitioner, who was personally present before the Chief Judge, was ordered to appear at that hearing. (Tr. 3013). Petitioner in April presented a few witnesses and introduced in evidence either by stipulation or waiver of objection the most important of the affidavits he had obtained from certain witnesses living in Europe. (Tr. 3079, 3108, 3170, 3262, 3397, 3400-01, 3414, 3416-17, 4211-14). He subsequently submitted a memorandum, at Chief Judge Whitehurst's suggestion (Tr. 3419), digesting these affidavits. (Tr. 4214-51). Leave to take depositions of the other proposed deponents was denied. (Tr. 3417, 4211-14).

This respondent submitted a small amount of rebuttal evidence, and final argument was heard by Chief Judge Whitehurst during the week of June 12-16, 1961. (Tr. 4313-15). The issues again were fully canvassed. The petitioner was personally present at the Chief Judge's express order. (Tr. 4214).

At the end of that hearing Chief Judge Whitehurst dismissed the murder charges but found that the evidence overwhelmingly established probable cause to believe the petitioner guilty of the financial crimes (Tr. 4253-54), that

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documents came to this country from Venezuela—authenticated in due form and certified to be so authenticated by the United States Embassy pursuant to 18 U.S.C. § 3190—meant that many pages covered by a single certification had to be included even though only a few pages of important evidence were among them.

[9] In response to Chief Judge Whitehurst's request for memoranda that would aid him in his consideration of the evidence, this respondent filed a brief paper guiding the judge to what was important in the evidence by reference to his previously filed fact memorandum and other documents. Petitioner refiled, with a new title and only two or three minor changes, the exhaustive memorandum he had previously submitted in support of his motion to dismiss. These documents were a part of the record transmitted to the Court of Appeals (see Tr. 258, Items 6, 7) but were not printed. They have been filed by this respondent with the Clerk of this Court.

these were crimes named in the Treaty of Extradition and that, having been committed solely for petitioner's private financial benefit, the crimes were not of a political character so as to be immune from extradition under Article III of the Treaty. (Pet. App., pp. 34a-39a). He found the evidence insufficient to connect the petitioner with the murders in which he was charged with participating.

In consequence, as directed by 18 U.S.C. § 3184, Chief Judge Whitehurst at once ordered the petitioner committed to the custody of the United States Marshal to await the action of the Secretary of State. (Pet. App., p. 34a). Likewise, pursuant to the statute, Chief Judge Whitehurst certified to the Secretary of State, along with the evidence he had received, his finding of probable cause, which, he stated, was made "upon consideration of all of the evidence submitted, the pleadings of the parties, the arguments of counsel, written and oral, and the orders heretofore entered herein." (Pet. App., pp. 34a-39a).

The certifications to the Secretary of State were settled at an informal conference a week after Chief Judge Whitehurst announced his conclusions from the bench. In the course of this conference the Chief Judge made the remark quoted in the petition (Pet., p. 19) about his reading of the evidence.

That concluded the extradition proceeding.

B. The Habeas Corpus Proceeding

Before he presented his own evidence in the extradition case petitioner filed a premature petition for habeas corpus in which he claimed that he was entitled to be released from the "custody" in which he was held (in fact, he had been free on bail since the beginning of the extradition proceeding) by reason of the so-called Act of State doctrine. (Tr. 2-11). This is a point that he has abandoned in this Court. (See *infra*, p. 46, n. 32). An order to show cause was issued

on this petition (Tr. 11-12) but no further action had been taken by the time the extradition case ended.[10]

After the conclusion of the extradition proceeding petitioner filed an amended petition for habeas corpus alleging a number of infirmities in the extradition proceeding. (Tr. 63-76). His principal contention was that he had not received a fair hearing. He also alleged that the crimes charged were not within the Treaty, that there was no competent evidence to support the charges, that the crimes were political offenses or acts connected with political offenses, that Chief Judge Whitehurst had not properly acquired jurisdiction and that the Act of State doctrine forbade his extradition. He did not assert that Judge Mathes did not have jurisdiction because of the terms of his assignment to the Southern District of Florida or that neither Judge Mathes nor Chief Judge Whitehurst could constitutionally exercise the jurisdiction in extradition conferred upon them by statute.

An order to show cause was issued on the amended petition (Tr. 80) and the matter was heard before Judge William A. McRae, Jr., of the District Court for the Southern District of Florida. All the issues again were thoroughly briefed and argued (Tr. 267-422, 137-249), and Judge McRae at the conclusion of argument discharged the orders to show cause and dismissed petitioner's petition. (Pet. App., pp. 29a-33a).[11] This was on August 23, 1961.

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[10] The pendency of the habeas corpus petition, however, did provide petitioner with a vehicle for obtaining his release on bail promptly after his commitment by Chief Judge Whitehurst. Chief Judge Whitehurst refused bail, but petitioner's counsel immediately went before another judge of the District Court, who entered an order granting bail in the habeas corpus docket. (Tr. 61-63).

[11] It will be recalled that the original warrant of arrest issued by the Venezuelan Supreme Court of Justice and its determination that the extradition of the petitioner should be requested covered both the murders, which are now out of the case, and the

Petitioner appealed to the Court of Appeals for the Fifth Circuit. After briefing and argument on October 1, 1962, that court on December 12, 1962, issued its opinion and entered its judgment affirming the judgment of the District Court. (Pet. App., pp. 1a-28a). It disposed of every contention petitioner made, holding that he had had a fair hearing before a judge with statutory power to act, that there was competent evidence to support Chief Judge Whitehurst's finding of probable cause, and that petitioner's crimes were not political and were covered by the Treaty. The court also raised on its own motion and decided affirmatively—in agreement with the position then taken by petitioner—the question whether the judge who conducted the extradition proceeding could constitutionally be authorized to do so. (Pet. App., pp. 9a-10a).

* * *

After all this time and the opportunities—fully availed of—to be heard before three tribunals (four if Judge Mathes and Chief Judge Whitehurst are separately counted) petitioner comes to this Court urging as the principal reason for granting the writ a point he eschewed below when it was suggested by the court, that the extradition judge had no constitutional power to decide the case against him for the reason that the Secretary of State may yet conclude that he should receive executive indulgence and not be surrendered to Venezuela. He also sets forth in

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financial crimes. After Chief Judge Whitehurst's commitment of the petitioner and his certification to the Secretary of State, the Supreme Court of Justice, upon petition of the Attorney General of Venezuela, entered a further order on the charges of financial crimes against the petitioner. Based on that order, a formal requisition for the surrender of the petitioner for trial on those charges and those charges only has been presented to the Department of State by the Venezuela Ambassador. These documents were in the record before Judge McRae and the Court of Appeals. (Tr. 97-120, 126-27).

a new guise his contention that, whatever the extent of the crimes committed by him in abuse of his office, he is immune from extradition because he is a former head of government. And he raises—faintly—some procedural points of no general importance that were either adequately disposed of below or have long since been waived.

SUMMARY OF REASONS FOR DENYING THE WRIT

I.

There is no substantial question of the constitutionality under Article III of the Constitution of the extradition statute, 18 U.S.C. § 3184, insofar as it authorizes justices and judges of courts created under Article III to determine whether a fugitive should be committed to jail to await action of the Secretary of State in extradition. This Court has approved judicial proceedings in extradition, independent of executive control, as the appropriate means for determining whether an accused should be committed for action by the Secretary of State upon a showing by the demanding government of evidence of probable cause—that is, of evidence that would be sufficient to justify holding a fugitive if his crime had been committed here. Such approval was given both before and immediately after the statute that is now 18 U.S.C. § 3184 was enacted 115 years ago. *In re Metzger*, 46 U.S. (5 How.) 176 (1847); *In re Kaine*, 55 U.S. (14 How.) 103 (1852). The independent judicial hearing is designed to guarantee the protection of the rights of the accused.

A judge sitting in extradition does not act as a mere advisor to the Secretary of State. If his judgment is against the demanding government, it is binding upon the parties and the United States. A judgment in favor of the demanding government results in physical commitment of the fugitive to await the action of the Secretary of State and is a prerequisite to the Secretary's exercise of his power to surrender a fugitive.

In holding a hearing to determine whether a fugitive should be bound over for action by the Secretary of State,

a federal judge is doing precisely what he does when he sits as a committing magistrate in a preliminary hearing upon a charge of a domestic crime, a function he has been empowered to perform since the passage of the Judiciary Act of 1789. *Collins* v. *Miller*, 252 U.S. 364 (1920). The magisterial power of commitment, whether or not incident to a continuing criminal proceeding, has traditionally been regarded as a part of or an incident to the judicial power defined in Article III, *Dallemagne* v. *Moisan*, 197 U.S. 169 (1905); *Robertson* v. *Baldwin*, 165 U.S. 275 (1897), and its exercise by a judge of an Article III court, free from executive control, does not pose any threat to the independence of the judiciary or to the separation of powers doctrine.

By a simple change in the form of the statute, 18 U.S.C. § 3184, it could be made to vest jurisdiction in Article III courts free from constitutional doubts. In any event, it is clear from unquestioned statutes of long standing and decisions of this Court that federal judges may, consistently with Article III, be authorized to perform certain official acts other than acts that may be or are performed by the courts of which they are members. Commitment in extradition is that kind of act.

The pendency in this Court of Nos. 1 and 4, October Term, 1962, cases arising from the same extradition proceeding as is involved here and raising questions as to the scope of the powers of an extradition judge, does not make any more substantial than it would otherwise be the challenge made in the present petition to the power of such a judge to proceed at all, and therefore is not a reason for granting this petition.

II.

The extradition judge found that the evidence established probable cause to believe the petitioner guilty of financial crimes such as embezzlement, committed in abuse of his high public office and for his own personal enrich-

ment. The evidence was overwhelmingly to that effect, and there was no effort otherwise to explain it or to controvert it in any way. The crimes as to which probable cause has been found thus had no political purpose and were unrelated to any political disturbances, and the Court of Appeals correctly held that they were therefore not political offenses or acts connected therewith within the meaning of Article III of the Treaty of Extradition between the United States and Venezuela. Petitioner's position that he is immune from extradition for these crimes because he is the former head of a foreign government has no support whatever in the judicial opinions and other authorities that have established the contours of the political offense concept in United States extradition law. The contention, which would bend the law to serve the rank of the man, is frivolous. There is no occasion for this Court to review the judgment below in this regard.

Petitioner's alternative suggestion under Article III of the Treaty, that his crimes should be adjudged political because of alleged political enmity between him and the present government of Venezuela, is equally without substance. It is either an attempt to have this Court direct the judiciary to do what the Court has previously forbidden it to do, *i.e.*, to inquire in an extradition proceeding into the motivation of the demanding government in seeking extradition, *Lincoln* v. *Power*, 241 U.S. 651 (1916), *affirming In re Lincoln*, 228 Fed. 70 (E.D.N.Y. 1915); *Kelly* v. *Griffin*, 241 U.S. 6 (1916); *Glucksman* v. *Henkel*, 221 U.S. 508 (1911), or it is a frivolous suggestion that the character of the petitioner's crimes, which is what Article III of the Treaty deals with, can be affected by circumstances not attending their commission but rather their prosecution.

III.

The so-called procedural errors alleged by petitioner were not errors at all and in any event relate to facts unique to this case and are of no general importance. The participa-

tion of Judge Mathes in the proceeding after February 29, 1960, when his last assignment to the Southern District of Florida ran out except to complete unfinished business, was perfectly proper and in no way prejudiced petitioner, who in any event did not object to it. Similarly, petitioner agreed to Chief Judge Whitehurst's taking up the case and is therefore precluded by the *de facto* judge doctrine from objecting at this late date. *McDowell* v. *United States*, 159 U.S. 596 (1895); *Ball* v. *United States*, 140 U.S. 118 (1891). Moreover, it was perfectly proper for another judge to assume responsibility for the case after Judge Mathes withdrew, *cf. Pettit* v. *Walshe*, 194 U.S. 205 (1904); *Grin* v. *Shine*, 187 U.S. 181 (1902), and Chief Judge Whitehurst complied substantially with any statutory requirement there may have been that he issue his own warrant to bring petitioner before him for a hearing of the evidence. Chief Judge Whitehurst's certification to the Secretary of State stated that his judgment was based upon a consideration of all the evidence in this case; and his remarks at an informal conference held to settle the form of that certification, that he had not read all of the evidence, much of which was of such a nature that it did not need to be read, cannot impeach his considered, formal statement.

REASONS FOR DENYING THE WRIT

I. The statute authorizing federal judges to commit fugitives in extradition poses no substantial question under Article III of the Constitution.

As the main reason for granting the writ petitioner urges that this Court should take up the question whether judges of courts created under Article III of the Constitution may constitutionally sit as committing magistrates in extradition proceedings as they have since the earliest days of the Republic. That they have done so and may do so with perfect constitutional propriety is, as we shall show, not open to doubt. No further consideration of the question by this Court is needed. Certainly the question should not

be entertained at the request of this petitioner, who cannot claim to be prejudiced by the participation in his case of judges of an Article III court. Moreover, what he regards as the infirmity in their so participating, the possibility of executive indulgence and refusal to surrender him despite a judicial commitment, is not prejudicial but favorable to him.

The premise of petitioner's Article III question is that the extradition judge is a mere adviser to the Secretary of State. He says the extradition proceeding is "nothing more than an extrajudicial advisory adjunct to the executive power to extradite. . . ." (Pet., p. 30).[12]

The premise is false. Completely independently of executive control, the extradition judge exercises the traditional power of United States judges to sit as committing magistrates. In doing so he makes a final determination having vital consequences for the demanding government, the accused person and the United States, and this function is in no way incompatible with any limitations that may be inferred from Article III on the tasks that federal judges can be authorized to perform.

This becomes apparent upon analysis of the theory of extradition, the nature of the extradition judicial process and the meaning of the extradition statute.

A. THE THEORY OF EXTRADITION UNDER THE TREATIES OF THE UNITED STATES.

Extradition is a manifestation of the quest of sovereign nations in the last century and a half to establish some form of international order.

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[12] It is only the fact that the Secretary of State ultimately determines whether a fugitive should be surrendered that gives the slightest color to petitioner's argument. Every other element required by Article III to make a case or controversy cognizable even by an Article III court is present in an extradition proceeding. *Cf.* Fong Yue Ting v. United States, 149 U.S. 698, 728-30 (1893). It arises under a treaty of the United States, adverse parties present opposing claims, and a determination is made of issues of fact and law relevant under the treaty.

Ease of travel, and therefore the flight of criminals, has made it essential that steps be taken to prevent national borders from becoming shields for criminals. To prevent this, nations might have undertaken to enforce the criminal laws of other nations. But there are strong reasons for having the actual trial of guilt or innocence in the nation where the alleged crime occurred. 1 Moore, *Extradition* § 3 (1891).

This is the position taken in the treaties of the United States—and, indeed, of other nations.

That determined, it might be provided—and perhaps between some nations it is—that any demand by one nation for the surrender of an accused for trial under its laws will be honored by the nation where the accused is found. Such a scheme would make controlling the need for international comity. (Our Constitution provides for precisely such comity among the States in interstate rendition. Art. IV, § 2[2].)

But the United States does not sacrifice so completely the interest of the individual accused. Its treaties have struck a balance between inter-nation comity and the individual's interest by providing that surrender in extradition cannot occur except for crimes named in treaties and upon a prescribed quantum of proof of the accused's guilt.

The categories of crimes vary from one treaty to another. But the quantum of proof that must be presented by the demanding nation is the same in all our treaties.

For the specification of this proof, our treaty makers might have created some special standard. But they did not. They turned to something ready-made.

In the domestic criminal process both of the common law system and of the civil law system there is ordinarily an initial step—the preliminary inquiry to determine whether the evidence is sufficient to justify holding an accused in physical custody or on bail for further steps in the process. It was to the standard prescribed for this inquiry that the treaty makers turned. In our first extradition treaty, a

section of the Jay Treaty of 1794, it was provided that the quantum of proof would be

> "such evidence of criminality, as, according to the laws of the place, where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial"

if the offense alleged were a domestic crime. Art. XXVII, 8 Stat. 129; see *Factor* v. *Laubenheimer*, 290 U.S. 276, 290-93, 296 (1933). And so it has been provided in all our treaties in virtually uniform language. See United States-Venezuela Treaty, Art. I, 43 Stat. 1699.

In short, to protect the individual accused the treaty makers have applied to the alleged foreign crime the requirement obtaining in the case of domestic crimes: that if an accused is to be held for trial proof establishing probable cause to believe him guilty must be presented.

B. THE NATURE OF THE EXTRADITION JUDICIAL PROCESS IN THE UNITED STATES.

The Jay Treaty said nothing about who, in the asylum nation, should make the required preliminary inquiry into the sufficiency of the demanding government's evidence. Neither did this nation's first treaty devoted exclusively to extradition, the Treaty with France of 1843, 8 Stat. 580, which contained the quantum of proof provision of the Jay Treaty. Section 33 of the Judiciary Act of 1789, 1 Stat. 91, however, had made judges of Article III courts magistrates to arrest and commit offenders against the laws of the United States.[13] State justices of the peace and other magistrates were similarly empowered. Later—in 1842—the officers now known as United States commissioners also were given the commitment power, 5 Stat. 516, which today they share with judges of Article III courts and state magistrates, 18 U.S.C. § 3041.

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[13] Under this statute Chief Justice Marshall acted as the committing magistrate in the treason trial of Aaron Burr. United States v. Burr, 25 Fed. Cas. 2 (No. 14,692a) (C.C.D.Va. 1807).

Since the treaty makers contemplated that, when the United States was the asylum nation there should be no surrender unless the demanding nation made an evidentiary showing the same as that which must be made to judges acting as magistrates pursuant to Section 33 of the Judiciary Act, it was quite natural that those same judges should be deemed competent to arrest and commit for extradition just as for a trial of a domestic criminal charge. This was the practice under the Jay Treaty.[14]

Not long after the conclusion of the French Treaty, the practice of having a judicial proceeding in extradition in accordance with the process of Section 33 of the Judiciary Act was challenged in this Court in *In re Metzger*, 46 U.S. (5 How.) 176 (1847). Judge Betts, a judge of a district court, an Article III court, received an extradition complaint, caused the arrest of an alleged fugitive from France, heard the evidence of criminality in chambers, found it sufficient and committed the fugitive to "abide the order of the President of the United States in the premises." *Id.* at 177; see *In re Metzger*, 17 Fed. Cas. 232 (No. 9,511) (S.D.N.Y. 1847).

On an application for habeas corpus in this Court, a unanimous Court held that:

> "The mode adopted by the executive in the present case seems to be the proper one. . . .
>
> "Whether the crime charged is sufficiently proved, and comes within the treaty, are matters for judicial decision; and the executive, when the late demand of the surrender of Metzger was made, very properly

[14] The best known case under the Jay Treaty was the case of Jonathan Robbins, discussed *infra* pp. 25-26, which was the subject of great public controversy. Some years later District Judge Betts, who had made a thorough study of the *Robbins* case, wrote that, "no where, in the severe scrutiny the subject underwent, does it appear an objection was raised to the competency of the judge [United States District Judge Bee] to arrest and commit by virtue of the" Jay Treaty. In re Metzger, 17 Fed. Cas. 232, 235 (No. 9,511) (S.D.N.Y. 1847); see also *id.* at 233.

> as we suppose, referred it to the judgment of a judicial officer. The arrest which followed, and the commital of the accused, subject to the order of the executive, seems to be the most appropriate, if not the only, mode of giving effect to the treaty." 46 U.S. at 188-89.

Indeed, Attorney General Clifford, in his argument to this Court, had urged that Section 33 of the Judiciary Act empowered the judge to act in the premises. *Id.* at 186.

The Court also held that since it had no appellate power over the action of a judge in chambers it had no jurisdiction "to examine into the cause of commitment. . . ." *Id.* at 191.[15]

Unlike the Jay Treaty and the French Treaty, Article X of the Webster-Ashburton Treaty of 1842 between the United States and Great Britain, 8 Stat. 576, which historically has been the most important of our extradition treaties, provided specifically for a proceeding before a judge or a magistrate to determine the probable cause issue as a prerequisite to any action by the Executive on the demanding nation's requisition for surrender. It added to the statement of the quantum of proof that had appeared in the Jay Treaty this clause:

> "[T]he respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the

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[15] In this aspect the case was subsequently described as one that "undoubtedly stands alone." In re Kaine, 55 U.S. (14 How.) 103, 133 (1852) (opinion of Nelson, J.). It was again questioned in Ex parte Yerger, 75 U.S. (8 Wall.) 85, 99 (1868). In Ex parte Virginia, 100 U.S. 339, 341 (1879), the Court said the authority of the case on this point "has been much shaken."

> duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive."

The quoted clause was borrowed by Congress almost verbatim as the heart of the original extradition statute, which was enacted in 1848, the year after the decision in the *Metzger* case. Significantly, legislation was sought by the Secretary of State (Buchanan) not because of any doubt as to the propriety of judges of Article III courts acting in extradition but because in the Northern District of New York there was only a single United States District Judge and needful swift action to apprehend fugitives from Canada could not be effected with him as the only available committing officer. State judges, it appeared, had refused to act and legislation was requested to provide specifically for their exercising the extradition function to supplement the federal judge. 8 *The Works of James Buchanan* 73 (Moore ed. 1909).

As finally adopted the statute elaborated "judges and other magistrates" in the Webster-Ashburton Treaty to read "any of the justices of the Supreme Court and the judges of the several District Courts of the United States —and the judges of the several State Courts, and the commissioners authorized so to do by any of the courts of the United States," and it expressly made it the duty of the magistrate, upon a finding of probable cause to believe the fugitive guilty of an extraditable crime, to commit him "to the proper gaol, there to remain until . . . surrender shall be made." 9 Stat. 302. Section 3184 of Title 18 as it reads today has come from that statute virtually without change.

The first case to reach this Court under the 1848 statute was *In re Kaine*, 55 U.S. (14 How.) 103 (1852), only four years later. The decision and its reasoning demonstrate — if further demonstration were needed after *Metzger*—how unsubstantial is the question petitioner seeks to raise. Issues going to the heart of the relationship between the

statutory judicial proceeding and the executive function in extradition were mooted and ruled upon, and, so far from being questioned under Article III of the Constitution, the propriety of an independent judicial proceeding in extradition was ringingly reaffirmed. And this was at a time when an Article III issue of the kind petitioner professes to see in extradition was fresh in the Court's mind. Just a year before in *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1851), such an issue was resolved, and Chief Justice Taney in that opinion resurrected the teaching of *Hayburn's Case*, 2 Dall. 409 (1792), and brought to light the case of *United States* v. *Yale Todd*, which was decided in 1794 after *Hayburn's Case*.

In *Kaine's* case a fugitive from England had been arrested and committed after hearing by a United States commissioner under the recent extradition statute. On habeas corpus a circuit court dismissed the writ. The fugitive then moved for the writ in this Court. The principal ground for the fugitive's attack on his commitment was a contention, founded on language in the Webster-Ashburton Treaty, that an extradition complaint could not be entertained judicially unless the demanding government had first presented the matter to the Executive of the United States and the Executive had determined that it should be entertained, which had not been done in that case.

Eight Justices sat. All but one—Mr. Justice Curtis—ruled that the Court had jurisdiction.[16] Of the remaining seven, four in an opinion written by Mr. Justice Catron, held that, though this Court had jurisdiction, 55 U.S. at 116-17, the writ should not issue because an executive mandate was not required prior to the judicial commitment proceeding.

The prevailing opinion paraphrases the statute, point-

[16] The petition here twice cites the *Kaine* case. At page 29 it cites Mr. Justice Curtis' opinion (without explaining that it was joined by no one else) in support of a proposition never asserted by Mr. Justice Curtis; and at page 32 n. 20 it cites the case itself on the same proposition, a patent miscitation.

ing out that it vested jurisdiction to apprehend and commit for extradition in federal and state judges and in authorized commissioners. Then it says,

> "That an Executive order of surrender to a foreign government is purely a national act, is not open to controversy; nor can it be doubted that this executive act must be performed through the Secretary of State by order of our Chief Magistrate representing this nation." 55 U.S. at 110.

But it does not follow, says the opinion, that Congress cannot make the provision it did for arrest and commitment "preparatory to a surrender." It concluded that "no doubt is entertained" that "the judicial magistrates of the United States, designated by the act," are empowered to arrest and commit "on proof of criminality, as in ordinary cases when crimes are committed within our own jurisdiction, and punishable by the laws of the United States." *Ibid.*

The opinion then moves to the main issue—whether a mandate from the Executive is necessary before the judicial machinery can take hold of the case. Not so, it holds. The reason is to be found in the outcome of the controversy over the case of Jonathan Robbins,[17] which "had most materially aided to overthrow the administration" of President John Adams. *Id.* at 112.

The opinion introduces this discussion thus:

> "The people of this country could hardly be brought to allow an interference of the President with the Judges in any degree. The experiment was made during Mr. Adams' administration, in 1799, and signally failed." *Id.* at 111.

Robbins had been arrested by a federal judge in extradition under the Jay Treaty, but the judge had not acted.

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[17] See United States v. Robins, 27 Fed. Cas. 825 (No. 16,175) (D.S.C. 1799), where not only the judge's opinion but also many of the documents and debates related to the ensuing controversy are reproduced.

further until the Secretary of State wrote him saying that the President "'*advises and requests* you to deliver him up.'" *Ibid.* The judge then held a hearing "fairly enough," and as a result Robbins was delivered to the British. A country-wide storm broke out over alleged presidential interfegence with the judiciary. Despite a brilliant defense of the President by Congressman John Marshall,

> "a great majority of the people of this country were opposed to the doctrine that the President could arrest, imprison, and surrender, a fugitive, and thereby execute the treaty himself; and they were still more opposed to an assumption that he could order the courts of justice to execute his mandate, as this would destroy the independence of the judiciary, in cases of extradition, and which example might be made a precedent for similar invasions in other cases; and from that day to this, the judicial power has acted in cases of extradition, and all others, independent of executive control. . . .
>
> ". . . Public opinion had settled down to a firm resolve, long before the treaty of 1842 was made, that . . . an extradition without an unbiased hearing before an independent judiciary, [was] highly dangerous to liberty, and ought never to be allowed in this country. Congress obviously proceeded on this public opinion, when the act of 1848 was passed, and therefore referred foreign powers to the judiciary when seeking to obtain the warrant, and secure the commitment of the fugitive; and which judicial proceeding *was intended to be independent of executive control*, and in advance of executive action on the case." *Id.* at 112-13. (Emphasis added.) [18]

The judicial process in extradition, then, is far from being a mere "extrajudicial advisory adjunct to the execu-

[18] The three dissenting Justices, who included Mr. Chief Justice Taney, did not disagree with this assertion of the judiciary's independence of the Executive in its action in extradition. Rather they believed that if the foreign demand were first screened by the Executive irresponsible requests for extradition would be foreclosed before an initial arrest.

tive power in extradition," as petitioner asserts. (Pet., p. 30). Instead it is designed to be and is a primary protector of individual rights.

So, under the statute that is now 18 U.S.C. 3184, the judicial process is completely independent of the Executive. In order to assure that the rights of the accused in extradition should be fully protected, Congress, following the practice codified in the Webster-Ashburton Treaty, drew upon the undoubted power of judges of Article III courts and other judicial officers to pass on the commitment of alleged offenders and provided for a procedure in all respects like the preliminary hearing that is afforded to alleged offenders against the laws of the United States. *Benson* v. *McMahon*, 127 U.S. 457, 463 (1888).[19]

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[19] As a further safeguard for those accused in extradition, Congress has limited the category of judicial officers who can act as magistrates more narrowly than it has in the case of domestic crimes. In addition to federal justices and judges, only commissioners especially authorized and judges of state courts of record and of general jurisdiction are given jurisdiction. 18 U.S.C. § 3184. In contrast, federal justices and judges, any United States commissioner and "any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justices of the peace or other magistrate, of any state . . ." may commit a domestic offender. 18 U.S.C. § 3041.

In 1900, in the aftermath of the Spanish-American War, Congress enacted a statute, 31 Stat. 656, now 18 U.S.C. § 3185, pursuant to which fugitives could be extradited from this country to foreign countries or territories occupied by or under the control of the United States. The ordinary extradition procedure was made applicable, except that Congress, apparently deeming this category of cases of particular gravity and delicacy, provided that the proceeding should be had "before a judge of the courts of the United States *only*, who shall hold [the fugitive] on evidence establishing probable cause that he is guilty of the offense charged." (Emphasis added.) The statute was attacked on a variety of constitutional grounds in Neely v. Henkel, 180 U.S. 109 (1901), and sustained. Proceedings under 18 U.S.C. § 3185 may still be had only before United States judges, and surrender of a fugitive committed by a judge is made by the Secretary of State who has the same discretion to decline to surrender as he has with respect to persons committed under § 3184. See 18 U.S.C. § 3186.

C. THE EFFECT OF THE EXTRADITION JUDGE'S DETERMINATION AND THE EXECUTIVE FUNCTION IN EXTRADITION.

What happens in extradition is this:

Pursuant to Section 3184, the demanding nation files a sworn complaint with the judicial officer. The accused is arrested and brought before the judge or other magistrate for a hearing of the evidence. The judge determines which if any of the charges in the complaint are charges of treaty crimes. The judge also determines which if any of such charges of treaty crimes are sufficiently sustained by the evidence to satisfy the probable cause standard of our domestic criminal law. If his decision is in favor of the demanding government he commits the accused to jail, certifying his finding, together with the evidence he has received, to the Secretary of State.

Then, as provided by 18 U.S.C. § 3186, "the Secretary of State may order" that the person so committed be surrendered to the demanding nation "to be tried for the offense of which charged. . . ." If the Secretary of State does not act within two months, the fugitive may be discharged unless sufficient cause is shown why he should not be. 18 U.S.C. § 3188. And our extradition treaties provide that the demanding nation may try the accused only on the charges for which he is surrendered. *E.g.*, United States-Venezuela Treaty, Art. XIV, 43 Stat. 1706.

As to the charges that are not within the treaty or not sustained by the evidence, the accused is freed by the judge. On those charges the Executive cannot even consider his surrender; the accused is immune from the exercise of the Executive power. See 6 Ops. Att'y Gen. 91, 94 (1853). The judge's determination as to them is conclusive upon the demanding nation and the United States alike.[20]

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[20] The demanding nation can present another complaint to the judge. Res judicata does not apply strictly, just as it does not apply in connection with a preliminary commitment proceeding in the domestic criminal process. But something closely akin to res judicata will be applied in extradition to prevent repeated complaints without good reason. Collins v. Loisel, 262 U.S. 426, 429-30 (1920); see also 6 Ops. Att'y Gen. 91, 97-98 (1853).

So, in the present case, the murder charges have been dismissed, and the petitioner thereby has secured immunity from surrender or, if he is surrendered on the other charges, immunity from trial in Venezuela on the murder charges.

An extradition judge's finding against the demanding government, therefore, is anything but "advisory." The judge's decision is final—more conclusive than would be the decision of the same judge sitting in a domestic preliminary hearing that the evidence was insufficient to justify holding the defendant. For nothing in the Constitution or statute precludes the United States Attorney from ignoring such a decision by a committing magistrate and seeking and obtaining an indictment of the same defendant and putting him to trial.

As to those charges that are found to be within the treaty and sufficiently sustained by the evidence, the judge binds the accused over for action by the Executive—exactly as, in domestic criminal process, he binds over for further action. This binding over takes the form of a commitment, an incarceration; it is both a determination that the Executive is *empowered* to act in the premises according to the precepts of treaty and statute—a determination of a strictly legal question—and an actual physical restraint.

The Secretary of State of course is not bound to surrender the fugitive. It would be inconsistent with our concept that foreign relations are conducted by the Executive, and probably unconstitutional, for Congress to leave the Secretary without discretion once the judge has committed the fugitive or to provide that the judiciary itself may order surrender.

But this no more means that the judge's determination of extraditability and commitment for such action as the Secretary of State may find proper is merely "advisory" than that the determination upon a domestic preliminary hearing that there is probable cause to believe the defendant guilty of a crime is merely "advisory" because the prosecutor may choose not to press charges or to seek an indict-

ment for some other crime, or the grand jury may choose not to indict. Theoretically either the prosecutor or the grand jury may believe that the committing judge was in error. But that does not make the judge's commitment a mere empty "advisory."

Petitioner founds his argument that the judge's action is purely "advisory" on *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948). (Pet., pp. 30-31). But reliance on that case for the proposition petitioner asserts discloses the fault in his analysis. There this Court's majority held that judicial review of a recommendation by the Civil Aeronautics Board as to how the President should dispose of an application for a license to operate an airline route would amount to a mere advisory opinion since, upon transmittal of the judicially reviewed recommendation to the President, he would be quite free to do as he pleased. But the action of the extradition judge is just as different from *Waterman* as was the judicial action considered in *McGrath* v. *Kristensen*, 340 U.S. 162 (1950). In the *Kristensen* case the question was whether the courts could review an order of the Attorney General refusing temporary postponement of deportation. A statute provided that, for certain reasons, the Attorney General could postpone a deportation, reporting his action to Congress, but that postponement could be effective only for a limited time unless Congress affirmatively determined that the alien should not be deported. It was suggested, on the basis of *Waterman*, that court review of the Attorney General's action would transgress Article III because, even were he to postpone in light of court review, it would be Congress—not the courts—who would determine the alien's fate. Congress, of course, could act on any basis it pleased—that the court was in error or any other basis. This Court quickly saw the great difference from *Waterman*. In *Waterman* the court's action would affect no one; only the President's action would be consequential. But in *Kristensen* the court's action would have effects—even if only for a limited period. 340 U.S. at 167-68.

So here, the extradition judge's action, as we have seen, has very crucial effects. A decision for the fugitive frees him. A decision against the fugitive jails him for a substantial period. That the Secretary of State might ultimately refuse to surrender him no more dissipates the effect of the extradition judge's commitment than would Congressional refusal to waive deportation dissipate the effect of the temporary postponement of deportation in the *Kristensen* case. Indeed in this very case, this petitioner, anxiously seeking release from jail since the Court of Appeals' decision, would be the last to assert that the judge's commitment has had no consequences.

D. *THE LACK OF MERIT IN PETITIONER'S ATTEMPTED DISTINCTION OF THE COMMITMENT POWER.*

Petitioner says that the analogy of the extradition judicial proceeding to the domestic preliminary hearing does not answer the question he poses, and he supports this by wrenching out of its context a statement by this Court so as to make it seem to say that the conduct of a preliminary hearing by a judge is permissible because the court has the final decision of the entire criminal case. (Pet., p. 35). This attempted distinction is wholly without merit for two reasons. First, the opinion from which he quotes, read in full context, does not at all distinguish extradition from the preliminary hearing but assimilates the two proceedings. Second, this Court has sustained the exercise of the commitment power, in circumstances strikingly like those of extradition, where there was to be no further judicial proceeding as to which the court had the final decision.

1. The case from which petitioner quotes an isolated phrase is *Collins* v. *Miller*, 252 U.S. 364 (1920). This was a unanimous decision with an opinion by Mr. Justice Brandeis.

A district judge had committed a fugitive in extradition on three charges. On habeas corpus a brother district judge had held that on one of the charges the commitment was proper but that on the other two charges the fugitive

had been wrongfully denied the right to introduce certain evidence. He remanded the case to the extradition judge on those charges, purporting to grant the writ as to them but ordering detention to continue pending the outcome of the remanded proceedings. On appeal this Court dismissed on the ground that there was not a final judgment since there had been a single petition for habeas corpus that, in view of the remand, had not been finally disposed of. The reasoning of this Court's opinion led it to inquire into the nature of the relationship between the two judges—the habeas corpus judge and the extradition judge, termed in the opinion, "the extradition commissioner." 252 U.S. at 369.

Most significantly the opinion reasons that the order of remand by the habeas corpus judge

> "resembles . . . that which might be entered by a district judge after having reviewed the proceedings taking place before a United States commissioner, under the court's authority to assume control in the preliminary stages of matters of which it has the final decision under the law." *Ibid.*

At that point the opinion cites a series of cases dealing with various aspects of the relationship between a commissioner and his court, including the relationship existing where a commissioner conducts a preliminary commitment proceeding in a domestic criminal case. The point made in the opinion, of course, is that the extradition judge's own court, acting in habeas corpus, can and does exercise a measure of supervision over the extradition judge (or commissioner) just as it does in the supervision of the preliminary commitment procedure in domestic cases.

On this reasoning, if there were any slight substance to the question that petitioner poses—*i.e.*, that a judge of an Article III court is forbidden to act in extradition at all because his court is forbidden to do so—Mr. Justice Brandeis could not possibly have avoided noticing and

dealing with the question.[21] For he was holding that the lack of finality came about because the habeas corpus court was retaining control over the extradition proceeding itself, just as a court controls a domestic preliminary commitment proceeding conducted by one of its commissioners. Indeed, the Justice went so far as to suggest the possibility that the habeas corpus court might have conducted the extradition hearing *de novo*, taking the excluded evidence, and have itself determined "whether the prisoner should be discharged:" although, since the habeas corpus judge had not undertaken to do so, the opinion states that it was unnecessary to consider whether that could have been done. *Id.* at 370. *Cf. Grin* v. *Shine*, 187 U.S. 181, 187-88 (1902).

2. The magisterial power of commitment, exercised by judges of Article III courts historically and today, is by no means limited to cases in which a person is bound over for further judicial action.

The case of *Dallemagne* v. *Moisan*, 197 U.S. 169 (1905), is especially instructive on this point. There this Court went out of its way to hold that an Article III court could exercise a commitment power very like the extradition commitment power conferred upon judges of such courts by 18 U.S.C. § 3184. That case involved Rev. Stat. §§ 4079-81, enacted to effectuate treaties giving foreign consuls jurisdiction over controversies among alien seamen aboard foreign vessels. A foreign consul was authorized to apply "to any court of record of the United States" or to a judge or commissioner to arrest a seaman. Upon the arrest the court or judicial officer could hold a hearing and if the requisite showing was made—which was comparable to the probable cause showing that must be made in extradition—could commit the seaman for not more than two months, within which time the consul would have to

[21] That Mr. Justice Brandeis was not unaware of the very materials from which the petitioner principally constructs his Article III question (Pet., pp. 29-30) is shown by his citation, 252 U.S. at 369, of United States v. Ferreira, 54 U.S. (13 How.) 40 (1851), and 6 Ops. Att'y Gen. 91 (1853).

arrange to return him to his country or he would be released.

In the *Dallemagne* case an arrest was made on a consul's application, but not by a court or judicial officer as authorized in the statute. On the consul's appeal from a district court judgment discharging the seaman on habeas corpus this Court reversed, holding that, though the arrest had been illegal, when the seaman was brought into the district court on the writ that court could proceed with the examination and commitment of the seaman, since the court itself was one of the agencies authorized by the statute to hold a hearing and commit to the consul. *Id.* at 174-76. It would require a highly technical distinction to differentiate in constitutional terms commitment by an Article III court for two months to await the action of a foreign consul and commitment by a judge of the same court for at least two months to await the action of the Secretary of State.

E. *THE DOUBTFULNESS OF PETITIONER'S CONTENTION THAT AN ARTICLE III COURT COULD NOT CONDUCT THE EXTRADITION JUDICIAL PROCESS, AND THE LACK OF NEED TO REACH THE QUESTION.*

Though the petitioner asserts it as hornbook law that an Article III court could not act in extradition he is quite wrong. Section 3184 itself could readily be so rephrased that there would be no doubt that an Article III court could exercise the power.

It would plainly be constitutional for Congress to provide for initiation by the Executive of action to extradite a fugitive upon the request of a foreign government, with the fugitive entitled to petition in an Article III court for a decree that he was immune from extradition unless in such statutory proceeding the demanding government submitted evidence giving the court probable cause to believe him guilty of a treaty crime. The fact that if the court denied relief to the fugitive the Secretary of State would not be required to surrender him would raise no Article III question. *McGrath* v. *Kristensen*, 340 U.S. 162 (1950); *Perkins* v. *Elg*, 307 U.S. 325, 349-50 (1939).

The foregoing is precisely the effect—different only immaterially in form and in wording—of 18 U.S.C. §§ 3184 and 3186. Surely a constitutional question that can be obviated by merely reversing the positions of the parties and changing the form but not the substance of the judgment that is entered is not so substantial as to require the attention of this Court.[22]

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[22] Petitioner states at one point that this Court has already decided that the extradition proceeding as now provided for is not within Article III. He says that this Court "has made plain the non-Article III nature and hence the non-reviewability of the determinations of an individual judge or commissioner in the extradition-type proceeding." (Pet., pp. 31-32). He cites five cases. Not one is even close to his text. Extradition decisions of federal judges and commissioners are not reviewable by way of appeal because Congress has not provided for an appeal; it would not be the way of this Court to premise a decision on a constitutional point when a clear statutory premise was available, and of course it has not done so. Indeed, we know of only one case in which it has been sought to take an appeal from a decision of an extradition judge, and in that one the Court of Appeals dismissed the appeal on the statutory ground with no discussion whatever of Article III. Jimenez v. Aristeguieta, 290 F.2d 106 (5th Cir. 1961). No petition for certiorari was filed.

The cases that petitioner cites for the proposition he asserts do not support it either in holding or in dicta. Two of them, indeed, establish the propriety of the judicial proceeding in extradition, as we have seen (*supra*, pp. 21-26): In re Kaine, 55 U.S. (14 How.) 103 (1852); In re Metzger, 46 U.S. (5 How.) 176 (1847). A third, In re Oteiza y Cortes, 136 U.S. 330 (1890), is, like *Kaine*, a case in which review was had of an extradition decision by way of habeas corpus and says nothing of Article III. Todd v. United States, 158 U.S. 278 (1895), holds that, in the tradition of strict construction of criminal statutes, a statute punishing intimidation of witnesses before a court will not be construed to punish intimidation of witnesses before a commissioner. A final case, United States v. Ferreira, 54 U.S. (13 How.) 40 (1851), does deal with Article III, but it does not deal with an "extradition-type proceeding" but rather with the processing by a judge of a claim presented and determined *ex parte*—a matter in which there were no suit, no parties, no judgment. *Id.* at 46-47.

But it is quite unnecessary for this Court to be drawn into a mulling of what Article III courts might be authorized to do. For even if some day it were to be held that Article III *implies* limitations upon permissible activities of judges of Article III courts—the Article does not speak of judges but only of courts[23]—it is quite inconceivable that such limitations would preclude activities as closely related to the courts' constitutional powers and functions as is the historic role of determining whether to commit an accused.

For if it is in mere inferences from Article III that limitations, if any, upon judges are to be found certainly those inferences must be based on the policy of Article III to assure the independence of the judicial department. Magisterial powers of arrest and commitment in preliminary hearings and in removal proceedings, of administering oaths and taking acknowledgments, of issuing warrants, and so on—powers shared in many cases by judges of Article III courts with non-Article III officers such as commissioners, *cf. Robertson* v. *Baldwin*, 165 U.S. 275, 279

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[23] Article III of course does not explicitly limit the judges, as the petitioner acknowledges. (Pet., p. 33). Nor has this Court ever held that it implies a limitation on the judges. *Cf.* United States v. Ferreira, 54 U.S. (13 How.) 40 (1851). Quite to the contrary, the limitation in Article III of this Court's original jurisdiction never applied to bar a Justice from sitting in lower courts and exercising a different original jurisdiction. *Cf.* also United States v. Clark, 25 Fed. Cas. 441, 442 (No. 14,804) (C.C.D. Mass. 1813), where Mr. Justice Story pointed out that a judge of a district court can act variously otherwise than within the confines allowed to his court—for example, he can act as a member of the circuit court or as a committing magistrate respecting crimes not cognizable by the district court.

(1897)[24]—have never been thought to threaten that independence. No more does the commitment proceeding in extradition, whose independence of the Executive has been secure since 1799 and was confirmed by Congress in 1848.

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[24] Commitment in criminal cases: 18 U.S.C. § 3041, derived from Judiciary Act of 1789, § 33, 1 Stat. 91.

Removal: Fed. R. Crim. P. 40, derived from Rev. Stat. § 1014.

Holding to security of the peace and for good behavior: 18 U.S.C. §3043, derived from Act of July 16, 1798, 1 Stat. 609.

Issuance of search warrants: Fed. R. Crim. P. 41, derived from various sources.

Commitment to foreign consuls of alien seamen involved in disputes affecting discipline of foreign ship: 22 U.S.C. §§ 256-58, derived from Act of June 11, 1864, 13 Stat. 121.

Commitment of deserting alien seamen: Rev. Stat. § 5280, derived from Act of March 2, 1829, 4 Stat. 359.

Issuance of warrant for detention of ship shown probably to be intent on engaging in foreign military expedition; ship detained might be released on order of President: Act of March 10, 1838, § 3, 5 Stat. 213.

Administration of oaths and affirmations and taking of acknowledgments: 28 U.S.C. § 459, derived from various sources.

Issuance of warrants and taking of testimony relating to House of Representatives election contests, testimony to be delivered to the Clerk of the House: 2 U.S.C. §§ 206-23, derived from Act of January 23, 1798, 1 Stat. 537.

Note also—

Making inquiry into whether revenue law penalty should be remitted; findings forwarded to Secretary of the Treasury, who made final decision: Rev. Stat. § 5292; see Mactavish v. Miles, 263 Fed. 457 (D. Md. 1920); The Palo Alto, 18 Fed. Cas. 1062 (No. 10,700) (D. Me. 1847).

Making inquiry into whether penalty incurred for importing goods from Great Britain and Ireland during War of 1812 should be remitted; findings forwarded to Secretary of the Treasury, who made final decision: Act of February 27, 1813, 2 Stat. 804; see The Margaretta, 16 Fed. Cas. 749 (No. 9,072) (C.C.D. Mass. 1815).

F. THE PETITIONER'S OTHER CONTENTIONS RELATING TO ARTICLE III.

1. Petitioner asserts that, for the purpose of Article III, a distinction between judges and courts cannot realistically be drawn and that, in any event, it was obscured in this proceeding. (Pet., pp. 36-41).

The fact is, however, that the distinction is taken in many statutes. The commitment statutes to which we have referred, naming sometimes both courts and judges and sometimes only judges, are one example. (*Supra*, p. 37 n. 24). For another, the habeas corpus statute does not empower the courts of appeals to issue the writ but does confer that power upon circuit judges, and the distinction is carefully maintained. 28 U.S.C. § 2241(a); see *Chapman* v. *Teets*, 241 F.2d 186 (9th Cir. 1957); *Walshfer* v. *Jacques*, 198 F.2d 711 (6th Cir. 1952). Again, in *United States* v. *Ferreira*, 54 U.S. (13 How.) 40, 50 (1851), the Court said of *Hayburn's Case* that "there seems to have been no doubt at that time" that if the statute there involved could be fairly construed as giving power to individual judges "they might constitutionally exercise" it even though as courts they could not. *Cf. Todd* v. *United States*, 158 U.S. 278, 284 (1895); *United States* v. *Clark*, 25 Fed. Cas. 441, 442 (No. 14,804) (C.C.D. Mass. 1813) (Story, J.). Thus there is no basis for saying that generally there can be no distinction between a judge and the court on which he sits. (It is not this Court that administers the oath of office to the President.)

As to the alleged obscuring of the distinction between court and judge in the extradition proceeding in this case, the reasons given by the petitioner for his contention are attributable to the habits of counsel, judges and clerks of court in matters purely of form or are related to the administration and oversight of court personnel and have nothing to do with Article III or with petitioner's argument.

The facts that pleadings were given a district court caption and the case a district court docket number, that prayers were sometimes addressed in form to the court and that proceedings were held in a regular courtroom are

plainly of no consequence. See *Collins* v. *Miller*, 252 U.S. 364, 367 (1920). (By statute, the proceeding must be conducted on land in a public place. 18 U.S.C. § 3189.) In one of his attempts to secure release on bail, in December 1962, petitioner addressed a petition for habeas corpus to a circuit judge, and the hearing was held in a courtroom and both his petition and the order denying it bore court of appeals captions.

Nor is it at all relevant that four district judges acted in the extradition case.[25] Each of them had statutory authority to act, there was no objection by petitioner or any other party and none of the judges regarded himself as acting otherwise than pursuant to the statute. *Cf. Grin* v. *Shine*, 187 U.S. 181, 187-88 (1902). Furthermore, there is no doubt that Judge Mathes had authority to act as a judge in extradition in Florida by virtue of his assignment to the Southern District of Florida by the Chief Justice, 28 U.S.C. § 296, and when he was relieved of further responsibility in cases in the Southern District of Florida, by his own action confirmed by the Judicial Council of the Fifth Circuit (Tr. 2793-98; *supra*, p. 9), and no longer sat in that district, he probably lost his power to act in the extradition case. *Cf. Frad* v. *Kelly*, 302 U.S. 312 (1937). That this may have been an effect of the Judicial Council's order entered in the fulfillment of its duty to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit," 28 U.S.C. § 332, certainly does not mean as petitioner says (Pet., pp. 39-40) that Judge Mathes must have been acting as a court in this case. Even if the order of the Judicial Council was intended, as it apparently was, to include the extradition case (Tr. 2902), the case, being heard by one of the judges of the district court, certainly affected "the business of the courts" so as to place it within the administrative competence of the Judicial Council. (And see Pet. App., p. 9a).

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[25] See *supra*, p. 5, n.3, for the very minor extent of the participation of two of these judges, and that only at a very preliminary stage of the proceeding.

2. Petitioner urges that the pendency here of Nos. 1 and 4 of this Term, the subpoena cases growing out of this extradition proceeding, is a reason for granting certiorari in this case. He goes so far as to say that briefing and argument of those cases were postponed by this Court "to await the filing and consideration of the instant petition." (Pet., p. 42).

The statement by the petitioner is, of course, quite erroneous. The postponement of Nos. 1 and 4 occurred at the beginning of the 1961 term because the extradition of the petitioner would moot those cases, but with habeas corpus then pending ultimate extradition was not certain. Consideration "of the instant petition" was not even contemplated.[26]

In any event the pendency of Nos. 1 and 4 is no reason to grant certiorari in the present case. The cases are related, as now framed, only in that they arise from the same extradition proceeding; the issues posed are quite distinct.[27]

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[26] It is equally erroneous to say that this respondent sought postponement of action in Nos. 1 and 4 because "the premise of the jurisdictional problem here at issue" is similar to one of the arguments advanced in Nos. 1 and 4. (Pet., p. 42). The error of that statement is obvious since "the jurisdictional problem here at issue" had not even been hinted at or thought of by anyone (least of all this petitioner) at the time of the postponement of Nos. 1 and 4. The argument being made by the petitioner in the habeas corpus case to which the present respondent referred in suggesting postponement of Nos. 1 and 4 was that Judge Mathes' jurisdiction in the extradition case was never terminated because he had jurisdiction as a "judge" and not as a "court," that therefore he remained seized of the complaint filed with him, and that all that followed his ceasing to act in the case was void because only he could act on that complaint. This argument was disposed of by the court below so convincingly that the petitioner has abandoned it. (Pet. App., pp. 6a-10a). Now, indeed, he reverses his field and argues that Judge Mathes lost jurisdiction by expiration of his assignment. (*Infra*, pp. 54-57).

[27] Petitioner also adverts to Nos. 1 and 4 in suggesting that somehow the distinction between the judge conducting the extradition proceeding and the court on which he sat was lost sight of. But if

The question presented in Nos. 1 and 4 is whether there is power to compel the production of evidence at the request of a demanding government in an extradition case or, stated abstractly, the scope of the powers of a tribunal conducting a particular proceeding. But in the present case the question petitioner seeks to present is whether the tribunal had jurisdiction to conduct the proceeding at all. The question is made neither less nor more substantial by the existence of outstanding questions respecting the scope of the tribunal's powers but assuming its basic jurisdiction. No one appearing in Nos. 1 and 4 has ever hinted that a judge altogether lacks jurisdiction of the extradition proceeding.

An analogy is this: Congress creates a new administrative agency. The question comes to this Court whether that agency has some power enjoyed by other agencies. The question is of general importance and, it may be further assumed, is a nice question under the statute creating the agency. At the same time a frivolous challenge is made to Congress' power to create the agency at all. It could not be seriously contended that it would not be wholly appropriate for this Court to hear the case posing the first question and at the same time refuse to hear the challenge to the agency's basic authority. *Cf. Hannah* v. *Larche*, 363 U.S. 420, 452 (1960).

If certiorari is denied in this case, Nos. 1 and 4 will be moot or imminently so because there will be no occasion for the exercise of the power to compel production of evidence in extradition for which this respondent contends in both cases. If certiorari were to be granted in this case, there probably would be no occasion to hear Nos. 1 and 4 for, if the petitioner were sustained in his Article III argu-

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one thing is clear, it is that the litigation over subpoenas, here as Nos. 1 and 4, was regarded by all concerned as involving separate and distinct district court proceedings. *Compare* Jimenez v. Aristeguieta, 290 F.2d 106 (5th Cir. 1961), *with* Aristeguieta v. Jimenez, 274 F.2d 206 (5th Cir. 1960), and First Nat'l City Bank v. Aristeguieta, 287 F.2d 219 (2d Cir. 1960).

ment, the questions in Nos. 1 and 4 would likely be deemed foreclosed, while if the judgment below was affirmed the cases would be moot in the same way as upon the denial of certiorari. In short, nothing in Nos. 1 and 4 warrants this Court's devoting its time to this case.

G. *PETITIONER'S LACK OF STANDING TO RAISE THE QUESTION HE SEEKS TO PRESENT.*

Petitioner has no standing to raise the constitutional question he seeks to present. His bizarre complaint is that his case was heard by a judge having the constitutional assurances of tenure and no diminution of compensation.

This, therefore, is not a case where a litigant claims that his right to an Article III decision has been impaired because a judicial officer allegedly without Article III status heard his case, the question heard last term in *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962). This is a case where the petitioner, on his own view of the case, received the benefit of *more* than his constitutional due, the attention of an Article III judge. How he can show that a constitutional right has been denied him to his injury is impossible to fathom.[28]

But the doubt as to petitioner's standing is even more fundamental. He does not, and cannot, argue that an Article III judge goes beyond permissible bounds in finally determining that he is immune from surrender on the murder charges that at one time confronted him. His argument is that an Article III judge goes beyond permissible bounds because the Executive can still decide in his favor not to surrender him after the judge has decided the case against him on the charges of financial crimes. We submit that the petitioner cannot complain because there remains to him such a possibility of executive indulgence.

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[28] Nor is this case like National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), where a defendant claimed the right to be sued in the state court of a state in which he did business and where, in any event, the federal Article III court was bound to notice a question of its own jurisdiction.

And beyond technical questions of standing, the petitioner acquiesced throughout in the hearing of his case by the judges of Article III courts. When the question was first raised by the court itself on oral argument in the court below (petitioner had not so much as hinted at it in his petition for habeas corpus or his appeal papers) petitioner declined to urge that a judge of an Article III court had no jurisdiction in extradition. His declination became the more pointed when he failed to ask for a rehearing in the Court of Appeals after that court had decided the question.

II. *SUMMARY AND CONCLUSION.*

Petitioner seeks to bring before this Court a question that every judge, court and extradition lawyer has regarded as settled since the decisions in *Metzger's* and *Kaine's* cases more than a century ago. In that time judges of Article III courts have heard many extradition cases, and in some of these, in the extradition proceeding itself or on habeas corpus, the Article III question would have come to the fore as it certainly would in *Collins* v. *Miller*, 252 U.S. 364 (1920) (*supra*, pp. 31-33), had there been any doubt about its proper resolution.[29]

There is, then, no uncertainty in the law that calls for the attention of this Court. The court below displayed no uncertainty. Having raised on its own motion the question now adopted by petitioner, it disposed of it without ado. (Pet. App., pp. 9a-10a).

There is, moreover, no substance to petitioner's question even if it is regarded academically and unrealistically as a novel one. The alternative to the judge acting in

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[29] Collins' case was heard here three times. See, in addition to *Collins* v. *Miller*, Collins v. Loisel, 259 U.S. 309 (1922), and Collins v. Loisel, 262 U.S. 426 (1923). Each time the action of a United States District Judge sitting in extradition was considered and each time the case was disposed of in a unanimous opinion written by Mr. Justice Brandeis, whose citations show that he was fully aware of the concepts that underlie petitioner's belated argument here. See 252 U.S. at 369; 262 U.S. at 429 n.1.

extradition would in all likelihood be an official of some agency such as the Immigration and Naturalization Service. For state judges have rarely been called upon to act in extradition, and there would be many practical problems were they asked to do so often. United States commissioners have frequently performed the extradition function but always under the supervision of the courts that appoint them. *Grin* v. *Shine*, 187 U.S. 181, 187-88 (1902); *In re Klein*, 46 F.2d 85 (S.D.N.Y. 1930). If the judges of those courts and, *a fortiori*, those courts themselves were barred from acting in extradition, the commissioners would no longer have the benefit of that supervision and thus would be less than satisfactory substitutes for the judges.

It would be ironical for this country in this way to prevent the members of its independent judiciary—whose participation in extradition free from executive control was secured in the aftermath of *Robbins'* case in 1799—from acting to assure that the rights of individuals will be protected. Other nations regard extradition as of sufficient gravity to the individual to warrant jurisdiction in their high courts and judges.[30] It is inconceivable that our Constitution would require this nation alone to cheapen the interest of an accused.

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[30] A selection of national extradition statutes as of 1935 is included in Harvard Research in International Law, Extradition, App. VI, 29 Am. J. Int'l L. Supp. 356 (1935). For provisions as to participation of courts and judges, see *id.* at 358, 360-61 (Argentina), 367-68 (Brazil), 370-72 (Canada), 378 (Chile), 387 (Germany), 406-07 (Greece), 409 (Italy), 417 (Sweden), 425 (Switzerland).

II. Embezzlement and other financial crimes committed for the private enrichment of the petitioner obviously are not within Article III of the Treaty excluding political offenses from extradition.

Article III of the United States-Venezuela Extradition Treaty, in common with similar provisions of this country's other extradition treaties and of the special extradition statute, 18 U.S.C. § 3185, *supra*, p. 27 n.19, excludes political offenses. Specifically, it provides:

> "The provisions of this Convention shall not import claim of extradition for any crime or offense of a political character, nor for acts connected with such crimes or offenses. . . ."

In his certification to the Secretary of State Chief Judge Whitehurst found that each of the financial crimes—embezzlement, criminal malversation, etc.—as to which probable cause was established "was for the private financial benefit of the defendant and is not a crime or offense of a political character or an act or acts connected therewith." (Pet. App., p. 38a). The Court of Appeals held that the "decision that the financial crimes were not political was based upon the evidence and is not reviewable here," citing this Court's opinion in *Ornelas* v. *Ruiz*, 161 U.S. 502, 509 (1896).

The evidence, indeed, was overwhelming. The acts charged were shown to have been committed with elaborate secrecy, through "fronts," "bagmen" and other covers, and with the money petitioner obtained through such acts either kept in cash in his personal safes or sent, mainly through messengers, far away to his personal accounts in banks in New York and Switzerland—never to banks in Venezuela. The evidence was clear that all this was done by the petitioner to enrich himself personally.

Chief Judge Whitehurst's determination was clearly correct and the court below applied the proper standard of review. There is no occasion for further review by this Court.

In the court below petitioner urged that the financial crimes for which he had been committed were acts "connected with" political offenses because they were joined in a complaint or "claim" that also included the murders with which he was originally charged and which he urged were political killings.[31] This obvious wordplay, which received the treatment it deserved from the Court of Appeals (Pet. App., pp. 17a, 18a-19a), is not repeated in this Court. Rather, petitioner now urges that abuses of office when committed by a head of government, though they consist of the gross acts of corruption and illicit personal enrichment shown here, are necessarily "in themselves political offenses" under Article III of the Treaty. (Pet., p. 51). It was under another guise that he argued something of this sort below.[32]

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[31] Chief Judge Whitehurst, on finding the evidence insufficient to connect the petitioner with the murders (Pet. App., p. 36a), deemed it unnecessary for that reason to determine whether the murders were of a political character and said a finding that they were would not affect the wholly separate financial crimes. (Pet. App., p. 38a). The Court of Appeals pointed out further that, since petitioner had been found not to be connected with the murders, they were certainly not political crimes attributable to him and whether they were political crimes by those who committed them could have no bearing on his case. (Pet. App., pp. 17a-18a).

[32] Petitioner contended below that as a former head of government he was immune from a judicial finding of extraditability because of the Act of State doctrine. The Court of Appeals readily disposed of this contention, stating that "common crimes committed by the Chief of State done in violation of his position and not in pursuance of it . . . are as far from being an act of state

There is not a line in a judicial opinion, in an executive decision, or in the writings of scholars in the field that lends the slightest support to this argument.' There is no question that a lower government official who, in abuse of his office, stole hundreds or thousands could be extradited; it has been done repeatedly. *Fernandez* v. *Phillips*, 268 U.S. 311 (1925); *Neely* v. *Henkel*, 180 U.S. 109 (1901); *In re Oteiza y Cortes*, 136 U.S. 330 (1890). But, on petitioner's view, the official's ultimate superior who took millions could remain in this country living in the luxury his thefts made possible. Petitioner's suggestion is, quite baldly, that what would otherwise not be a political offense becomes so only because the accused held highest rank.[33]

It is true, as petitioner says, that this Court has never formulated a detailed definition of political offense. But the boundaries of the concept have been marked out with reasonable clarity, and petitioner's financial misdeeds are nowhere near them.

The core of the concept is what scholars have termed the

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as rape which . . . [petitioner] committed would not be an 'Act of State.'" (Pet. App., p. 15a). Because of its demonstrated lack of merit (see the full discussion by the court below, Pet. App., pp. 14a-17a), the petition reduces the Act of State argument merely to a "pertinent" consideration under Article III of the Treaty and does not present it as a question for review here. Pet., pp. 50-51).

[33] It will be observed that the petitioner does not suggest that an offense is political and so immune from extradition because committed by abuse of a government official's power. The cases cited in the text foreclose such a contention. And the Treaty with Venezuela, like other treaties, explicitly contemplates that abuse of office in itself is not immunizing; it covers "embezzlement or criminal malversation . . . *by public officers*, . . ." Art. II, clause 14. *Cf.* the same category of extraditable crimes included in 18 U.S.C., § 3185, *supra*, p. 27, which likewise prohibits extradition for political offenses.

"purely political offense"—treason, subversion and the like."[34]

In order, however, to give full scope to the purpose for which the exemption of political offenses from extradition was developed during the nineteenth century—to prevent "the surrender of fugitives who had been engaged in unsuccessful democratic revolutions against monarchical governments"[35]—the concept must go beyond these core offenses to include what would otherwise be common crimes committed under such circumstances as to make them political in purpose. These are mixed or relative political offenses.[36]

This type of crime has produced the litigation in American law that has shaped the concept of political offense or acts connected therewith. Ordinarily the cases have involved murders or other crimes of violence such as robbery or arson committed by persons claiming to be

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[34] It may be that petitioner's theft of the 1952 election, a crime originally charged to him in Venezuela, would be considered a purely political offense. Petitioner asserts that this charge is still pending against him in Venezuela. (Pet., p. 49). Since it was not included in the warrant for petitioner's arrest issued by the Venezuelan Supreme Court of Justice (Tr. 1132-49), this is doubtful. In any event, Article XIV of the Treaty provides that "no person shall be tried for any crime or offense other than that for which he was surrendered," and there is no claim that Venezuela does not intend to adhere to this solemn commitment. Nor could there be here. Kelly v. Griffin, 241 U.S. 6, 15 (1916); Glucksman v. Henkel, 221 U.S. 508, 512 (1911).

[35] Jacob, International Extradition: Implications of the Eisler Case, 59 Yale L.J. 622, 630 n.30 (1950).

[36] For discussion of pure and mixed political offenses, see Harvard Research in International Law, Extradition, 29 Am. J. Int'l L. Supp. 113 (1935); Deere, Political Offenses in the Law and Practice of Extradition, 27 Am. J. Int'l L. 247, 248 (1933); García-Mora, The Nature of Political Offenses, 48 Va. L. Rev. 1226, 1231-39 (1962).

revolutionaries,[37] or by persons in power taking the field against their adversaries or otherwise combatting violence with violence,[38] or engaging in mopping up after a violent struggle.[39]

Writing in 1945, Professor Hyde said the common elements of the American cases decided up to that time in which the political offense immunity had been recognized were:

> "(1) There has been an uprising of revolutionary origin and purpose against the demanding government. . . .
>
> "(2) The accused has been connected with the movement. . . .
>
> "(3) Either the acts charged against the accused have been deemed incidental to the movement, or the evidence has failed to show that acts committed in the course of the uprising which might possibly not be justly regarded as incidental thereto, were in fact committed by the accused." 2 Hyde, *International Law* 1021-22 (2d rev. ed. 1945).

The cases decided subsequently have not impaired Professor Hyde's summary.

When the court below said, "There is no evidence that the financial crimes charged were committed in the course of and incidentally to a revolutionary uprising or other

[37] See Ornelas v. Ruiz, 161 U.S. 502 (1896) (political offense immunity disallowed); Case of William Lyon McKenzie, 1 Moore, Extradition § 211 (1891); Case of Francisco J. Cazo, *id.* § 217; Case of Christian Rudewitz, 4 Hackworth, Digest of International Law 49-50 (1942), and 2 Hyde, International Law 1021-23 (2d rev. ed. 1945); Case of Jan Janoff Pouren, [1909] Foreign R. 1, U.S. 513-23 (1914); Case of James Lynchehoun, 2 Hyde, *op. cit. supra* at 1021.

[38] See United States ex rel. Karadzole v. Artukovic, 170 F. Supp. 383, 392-93 (S.D. Cal. 1959), *on remand from* Karadzole v. Artukovic, 355 U.S. 393 (1958), *vacating* 247 F. 2d 198 (9th Cir. 1957); In re Ezeta, 62 Fed. 972 (N.D. Cal. 1894).

[39] Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla. 1959).

violent disturbance" (Pet. App., p. 89a), it was merely pointing out that there was no suggestion that the crimes here grew out of or were connected with the disturbances in Venezuela during the petitioner's years in office on which the petitioner had dwelt at length in some of his arguments about the political character of the killings. But the court was not saying that there could never be a case of political offense apart from one involving disturbances of that nature.

Whether there might be a political offense that is not within Professor Hyde's summary may some day receive the consideration of this Court. One can imagine such a case—for example, unlawful diversion of funds from one governmental purpose to another governmental purpose, unrelated to a political disturbance, *cf. In re Mylonas*, 187 F. Supp. 716, 720 (N.D. Ala. 1960)—but this case is certainly not the appropriate vehicle to explore the question. As a matter of fact there is a growing concern in international juristic circles as to whether the political offense immunity as defined in the past here and elsewhere is too broad—a concern that may be shared by this Court in view of its refusal to agree with two courts below that charges of mass murder against a top official of the World War II Nazi puppet government of Croatia were political on their face. *Karadzole* v. *Artukovic*, 355 U.S. 393 (1958). But that as it may, for the expansion of the political offense immunity to be considered in this case—where the plea is that immunity is attached to the petitioner's rank rather than to the offense—would be singularly awkward and unrewarding. For surely the plea is frivolous. Not even in the *Artukovic* case did the lower courts intimate that they thought there was necessarily a political offense because of the rank of the accused; indeed the magistrate who heard the case repudiated the suggestion. *United States ex rel. Karadzole* v. *Artukovic*, 170 F. Supp. 383, 392 (S.D. Cal. 1959).

The petitioner makes an alternative suggestion—that his

crimes fall within the political offense immunity because they are "connected with the manifold political crimes and charges leveled by petitioner's political opposition." (Pet., p. 51).

We confess that we find the suggestion thus put difficult to understand. The two sentences that immediately follow this suggestion may reveal what is meant: the petitioner says, "The underlying mosaic reveals the fundamentally political nature of the extradition *claims*. They are but the aftermath of a violent upheaval." (*Ibid.*) (Emphasis added.)

These two sentences, read against the petitioner's statements in his preceding discussion concerning President Betancourt's alleged enmity toward this petitioner and rather vague references to Venezuelan history and to "the political coloration of the effort to extradite," may mean that the petitioner is suggesting that the political offense immunity bars a demand or claim for extradition that is inspired by political antagonism or evil design.

If this is petitioner's meaning he seems to be trying to accomplish obliquely a reconsideration by this Court of one of the most firmly established tenets of extradition: that the judiciary is not authorized to inquire into the possible political or ulterior motivation of the demanding government in seeking extraditions; any such questions are reserved for the consideration of the Executive in deciding whether to surrender the fugitive or in determining what guarantees to require from the demanding government. See, *e.g.*, *Lincoln* v. *Power*, 241 U.S. 651 (1916), *affirming In re Lincoln*, 228 Fed. 70, 73-74 (E.D.N.Y. 1915); *Ramos* v. *Diaz*, 179 F. Supp. 459, 463 (S.D. Fla. 1959); *In re Ezeta*, 62 Fed. 972, 986 (N.D. Cal. 1894); see also *Kelly* v. *Griffin*, 241 U.S. 6, 15 (1916); *Glucksman* v. *Henkel*, 221 U.S. 508, 512 (1911); *Gallina* v. *Fraser*, 278 F.2d 77, 78-79 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960); *Laubenheimer* v. *Factor*, 61 F.2d 626, 628 (7th Cir. 1932), *aff'd*, 290 U.S. 276 (1933).

In fact the petition does not present, as one of its questions, a proposed reconsideration of this firm doctrine.

In any event Article III of the Treaty deals with the nature of the crimes for which extradition is sought; by no twist either of language or of doctrine can the alleged antagonism of officials of the demanding government be pertinent to the character of the crimes when they were committed. And we invite attention, further, to the singular paucity of citation to evidence in support of the statements made in the petition both at this point and in the related portion of the Statement of the Case. (Pet., pp. 7-8).[40]

Two specific points in petitioner's political crimes discussion may be briefly treated.

First, petitioner says in a footnote that Chief Judge Whitehurst denied his motions for leave to take depositions in Venezuela and Europe, "which would have de-

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[40] Here, as in the lower courts, the discussion of Venezuelan history and the alleged motivation of President Betancourt consists mainly of counsel's assertions, quite unsupported by any evidence. This may account, in part, for some of the garbling of history, even of historical dates, in the petition's Statement of the Case. On page 8 of the petition—the principal portion of the Statement related to the later discussion of the so-called "underlying mosaic"—there are only four transcript citations, Tr. 4326, 3102-3105, 3659, and 4242. Tr. 4326 is a purported newspaper story that was never even offered in evidence. Tr. 3102-3105 is some worthless and remote hearsay about some specific acts of violence bearing literally no relationship to the text for which it is cited. Tr. 3659 is a purported "Intelligence" memorandum, author unknown, purporting to be dated June 1952, included in a large bundle of documents attached to an affidavit that was received into evidence; the memorandum states that there was a "pact" between the Accion Democratica of Venezuela and adherents of ex-President Prio of Cuba looking to "defeating the military regimes which exist in some countries on the Continent." And Tr. 4242 is a page of a memorandum filed by counsel with the extradition judge. This sort of thing reveals that the evidentiary basis for the petitioner's question—whatever the question may be—is pure quicksand.

veloped further the essentially political character of the alleged financial crimes." (Pet., p. 50 n.41). The facts are these: By stipulation or by waiver of objection, petitioner had introduced in evidence the five affidavits that he himself regarded as the most important among those made by the persons whose depositions he wished to take in Europe, and this was quite agreeable to the petitioner. (Tr. 3004, 3397, 3400, 3411, 3417). These affidavits were prepared with the thought of possible stipulation and so represented the strongest version of what the affiants would have deposed. (*Supra*, p. 8). As for the other prospective witnesses in Europe, we can only invite the Court to read the affidavits that were offered to show what their testimony would be (Tr. 2861-77, 2887-2901, 2917-24); they would have contributed literally nothing to the record about the financial crimes or anything else. The motion to take depositions in Venezuela covered only witnesses who would have testified about the murder charges and had nothing whatever to do with the financial crimes. (Tr. 3018-19).

Second, petitioner says that he was granted asylum in the United States, citing former Vice President Nixon's account in a recent book of how he explained petitioner's presence in the United States to persons with whom he talked in Caracas during his visit in 1958. (Pet., p. 51). The pertinence of the statement baffles. In any case petitioner was "granted asylum" only in the sense that he was allowed to enter this country on a visitor's permit for one month, later extended for a few days. He overstayed his permit and has been formally ordered deported; execution of the order has been withheld pending the outcome of this proceeding. So temporary does he himself regard his asylum that he is resisting having his income taxed as that of a resident.[41] Moreover, petitioner's an-

[41] This was brought out at page 88 of the record of the proceedings dealing with bail presented with the petitioner's application to the Chief Justice for release on bail.

thority, Mr. Nixon, reports in the same book from which petitioner quotes (Pet., p. 8, n.2) that he pointed out at a press conference during that same trip to Caracas "that there was an extradition treaty between our two countries and that the United States would be more than glad to ship the two men [petitioner and his police chief, then in the United States] back to Venezuela for trial whenever the present Venezuelan Government wanted to resort to the proper procedures." Nixon, *Six Crises* 224 (1962). See also testimony of Assistant Secretary of State Rubottom in *A Review of the Relations of the United States and Other American Republics*, Hearing before the Subcommittee on Inter-American Affairs of the House Committee on Foreign Affairs, 85th Cong., 2d Sess. 17 (1958).

III. OF THE PROCEDURAL ISSUES RAISED BY PETITIONER ONE IS NOT EVEN PRESENTED ON THIS RECORD AND IT AND THE OTHERS ARE WITHOUT MERIT AND OF NO GENERAL IMPORTANCE.

1. Petitioner contends that, because of the terms of his assignment to the Southern District of Florida, Judge Mathes had no jurisdiction to act in the extradition proceeding after February 29, 1960. (Pet., pp. 52-53). Since petitioner is held under the commitment of Chief Judge Whitehurst, not that of Judge Mathes, that question is not presented on this record. It is, moreover, dependent on unique facts of this case and thus is of no general importance. And it is quite unsubstantial. Further, petitioner is barred from raising it because he never objected on this ground to Judge Mathes' hearing of his case.

a. Petitioner is not prejudiced by any action taken by Judge Mathes in the extradition case before or after February 29, 1960. After Chief Judge Whitehurst entered the case, he proceeded in full awareness that he was not bound by the rulings of Judge Mathes. (Tr. 2995, 3400). And it is Chief Judge Whitehurst's order of commitment, entered upon his independent consideration of the case, of which

petitioner now complains. The most important of the orders entered by Judge Mathes that petitioner mentions, his order refusing to dismiss the proceeding on the basis of this respondent's evidence, which petitioner says "cannot stand," does not stand. It was explicitly made without prejudice to renewal of petitioner's motion to dismiss. (Tr. 2705). And that motion was in substance renewed in petitioner's very extensive closing argument to Chief Judge Whitehurst, in which he relied upon the identical memorandum that he had submitted in support of his motion to dismiss. (See *supra*, pp. 9, 10 n.9). Moreover, it is perfectly clear that Chief Judge Whitehurst considered himself free to exercise his independent judgment on the evidence. He found the evidence insufficient with respect to the murders (Pet. App., p. 36a), even though Judge Mathes had declined, on his consideration of this respondent's evidence, to dismiss the count of the complaint charging the murders.[42]

[42] The other principal action of Judge Mathes to which petitioner adverts (Pet., p. 51) is his receipt of this respondent's evidence, all of which was documentary. But petitioner made no objection to consideration of that evidence before Chief Judge Whitehurst; and even so Chief Judge Whitehurst gave independent consideration to the admissibility of that evidence, stating in his certification to the Secretary of State that the originals of the papers constituting the evidence were "certified by the principal United States diplomatic officer resident in Venezuela to be properly and legally authenticated so as to entitle them to be received for similar purposes in the tribunals of Venezuela, in accordance with 18 U.S.C. § 3190." (Pet. App., p. 36a). A certification complying with 18 U.S.C. § 3190 is conclusive of the admissibility of evidence submitted on behalf of the demanding government in extradition. Bingham v. Bradley, 241 U.S. 511, 517 (1916); Elias v. Ramirez, 215 U.S. 398, 409 (1910). Petitioner also mentions Judge Mathes' having authorized the filing of this respondent's second amended complaint and having issued his warrant of arrest thereon. Petitioner never moved to quash the warrant, and in any event any possible defect in it is immaterial since he is not now held under it. *Cf.* Kelly v. Griffin, 241 U.S. 6, 12-13 (1916). Moreover, Chief Judge Whitehurst in substantial effect

b. That Judge Mathes' last assignment in Florida ran out on February 29, 1960, except to "complete unfinished business," does not invalidate the filing of the second amended complaint permitted by him nine days later or the rearrest of the petitioner that he effected at that time. The petitioner says that "a completely new proceeding was thus instituted, one that cannot be described as the continuation of unfinished business previously pending before Judge Mathes." (Pet., p. 53). This is wholly unrealistic. Theretofore Judge Mathes had been living with the case since September 1959; the filing of the second amended complaint, which was in the progression of amendments to the complaint previously allowed and which was responsive to a motion for a bill of particulars that the petitioner had pressed at an earlier date, was only a step in the procedural evolution of the case in which, by February 29, Judge Mathes was deeply involved. The same, of course, is true of the rearrest, which was merely incidental to the filing of the amended complaint.

c. Petitioner never objected to Judge Mathes' having acted in the case after February 29, 1960. He objected neither to Judge Mathes himself while he was acting nor to Chief Judge Whitehurst or anyone else after Judge Mathes had removed himself, with the confirmation of the Fifth Circuit Judicial Council. He is precluded from raising the question now.

Constitutional questions aside—and petitioner divorces this point from his Article III constitutional argument—

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himself rearrested the petitioner. (Pet. App., p. 9a; *infra*, p. 58). Petitioner's objection to the second amended complaint (aside from an argument based on Article XII of the Treaty that he pressed throughout the proceeding until he reached this Court [see Pet. App., pp. 27a-28a]) was that it did not charge crimes named in the Treaty. (Tr. 895-96). Chief Judge Whitehurst found, independently of any prior decision by Judge Mathes, that the charges of financial crimes in the second amended complaint were of crimes named in the Treaty. (Pet. App., pp. 36a-37a).

Judge Mathes was unquestionably a member of one of the categories of judicial officers designated by 18 U.S.C. § 3184 to act in extradition and was at the least a *de facto* judge in the premises. The jurisdiction of a *de facto* judge may not be questioned for defects in his assignment or similar infirmities. *McDowell* v. *United States*, 159 U.S. 596, 601-02 (1895); *Ball* v. *United States*, 140 U.S. 118, 128-29 (1891). Certainly the attack cannot be made for the first time in connection with a collateral review proceeding. *Grin* v. *Shine*, 187 U.S. 181, 188 (1902); *Ex parte Ward*, 173 U.S. 452, 454 (1899). In the absence of non-frivolous constitutional argument or "a strong public policy concerning the administration of judicial business," the *de facto* doctrine applies to prevent a litigant from sitting by and awaiting the outcome of a law suit and then raising a question of the competency of the tribunal to act. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 535-36 (1962). Petitioner asserts no such constitutional ground or strong public policy.

2. Petitioner also questions Chief Judge Whitehurst's jurisdiction and claims that he did not receive a full and fair hearing at his hands. (Pet., pp. 54-56). There is no substance to these contentions. They were fully answered by the Court of Appeals. (Pet. App., pp. 6a-13a).

Not only did petitioner fail to object to Chief Judge Whitehurst's conducting the extradition proceeding after Judge Mathes left the case, but he affirmatively agreed to the change in judges. At the first hearing before Chief Judge Whitehurst, his counsel said:

> "Unlike counsel, I won't address myself to the question of whether or not another judge should be assigned, because we have another judge assigned and that question is disposed of at the present time." (Tr. 2953-54).

In these circumstances the *de facto* doctrine is equally as applicable to this point as it is to petitioner's belated ob-

jection to the participation of Judge Mathes in the proceeding.

Moreover, under *Grin* v. *Shine*, 187 U.S. 181 (1902), and *Pettit* v. *Walshe*, 194 U.S. 205 (1904), it is clear that 18 U.S.C. § 3184 is not to be read so literally as to preclude anyone except the officer who receives a complaint and issues the warrant of arrest from proceeding thereafter in an extradition case. (See Pet. App., pp. 7a-8a). And finally, Chief Judge Whitehurst had the second amended complaint before him when he ordered the petitioner to appear before him on specific dates in order that the extradition case might be heard—without objection by the petitioner as to the form this effective warrant of arrest took. (Tr. 3013, 4214). As the Court of Appeals held, this fully satisfied the substantive requirement of the statute, if any there be, that Chief Judge Whitehurst establish his jurisdiction by the issuance—as the statute says—of "his warrant for the apprehension of the person so charged, that he may be brought before such . . . judge . . . to the end that the evidence of criminality may be heard and considered." (Pet. App., p. 9a). Chief Judge Whitehurst's orders that the petitioner appear before him amounted to precisely what the statute provides for. *Cf. Dallemagne* v. *Moisan*, 197 U.S. 169, 174-76 (1905).[43]

[43] It is hardly necessary to comment on petitioner's query as to whether Rule 63 of the Rules of Civil Procedure prevented Chief Judge Whitehurst from proceeding on "evidence admitted by another judge." (Pet., p. 54). None of the evidence received by Judge Mathes was by live witnesses; all of it was documentary. Everything was before Chief Judge Whitehurst anew that had been before Judge Mathes. Connelly v. United States, 249 F.2d 576, 580-81 (8th Cir. 1957), *cert. denied*, 356 U.S. 921 (1958); St. Louis Southwestern Ry. v. Henwood, 157 F.2d 337, 342-43 (8th Cir. 1946), *cert. denied*, 330 U.S. 836 (1947); Cahill v. Mayflower Bus Lines, 7 F. Supp. 869, 872 (S.D.N.Y. 1934), *aff'd*, 77 F.2d 838 (2d Cir. 1935), *cert. denied*, 296 U.S. 629 (1935). Rule 63 has no application.

The significance of Chief Judge Whitehurst's remark at an informal conference held for the purpose of settling the form of his certification to the Secretary of State that he had not "read all of the evidence" has been fully considered by the Court of Appeals (Pet. App., pp. 11a-12a) and does not raise a question meriting the attention of this Court. As the successor judge, Chief Judge Whitehurst took the steps he reasonably deemed necessary to familiarize himself with the record in the case. He had the benefit of exhaustive written analyses of the record by counsel on both sides; the petitioner's statement that the Chief Judge "ignored a memorandum previously submitted by petitioner's counsel" (Pet., p. 55; see also pp. 16, 19 n.7) is most misleading and flatly incorrect.[9] He also had the benefit of days of argument by counsel. All that Chief Judge Whitehurst said at the later informal conference was that he had not read all of the evidence, which, as we have explained, contained much material that did not need to be read, either because it was undisputed or because it was purely formal or repetitious or immaterial. (*Supra*, p. 9, n. 8). It bears emphasis that by the time Chief

[9] The writer of the petition has been led astray by the transcript of a discussion with Chief Judge Whitehurst at his initial conference with counsel. There counsel for this respondent had referred the Chief Judge to a memorandum he had previously filed on the evidence in the case and the Chief Judge expressed interest in it. Counsel for the petitioner then referred to a memorandum he had filed on his motion to dismiss before Judge Mathes. The Chief Judge indicated that he had no desire for that memorandum at that particular point. This is the passage in the transcript referred to at page 16 of the petition. But thereafter the Chief Judge gave *both parties* leave to file memoranda with him on all the evidence that had been received by Judge Mathes. Both parties in fact did so, before the evidentiary hearing before the Chief Judge began. Petitioner filed a slightly revised version of the memorandum he had filed on his motion to dismiss; it ran to more than 150 pages, plus appendices, and discussed the evidence in greatest detail. Then, after the petitioner's evidence was received he filed still another "fact memorandum" with the Chief Judge on that evidence. (See *supra*, pp. 8, 10

Judge Whitehurst entered the case the parties had cleared away much underbrush and had made many pages of the original evidentiary documents of the demanding government pure surplusage. In his certification to the Secretary of State, Chief Judge Whitehurst stated that he acted "upon consideration of all of the evidence submitted . . . ," and the fact that he acknowledged not having read every word in the evidentiary record does not justify going behind this solemn statement.

CONCLUSION

The most thoughtful attention has been given to this petitioner's case by able and conscientious judges and courts. The petitioner was afforded an unprecedented opportunity to prepare his defense (*cf.*, by contrast, *United States ex rel. Karadzole* v. *Artukovic*, 170 F. Supp. 383, 386-87 [S.D. Cal. 1959]) and to urge every possible argument, sometimes almost at leisure. After the earliest months of the case, when this respondent followed a course, in producing evidence and translations, designed to give the petitioner abundant advance notice (*supra*, pp. 6-7), this respondent has not been in the least responsible for the nearly four years the case has taken. That time does not speak well for the wieldiness of the extradition process. Substantial additional time should not now be added for consideration of the question presented by the petitioner under Article III of the Constitution, the only question seriously pressed. This respondent's Government did not select the judicial officer who determined its case. While it chose to bring its case to this country, both because of its Treaty and because it was assured that extradition process was available thereunder (*supra*, pp. 53-54), it was [redacted] hands of this country's authorities from that time forward with respect to the forum where its case was

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 958

MARCOS PEREZ JIMENEZ, *Petitioner*,

v.

GUY W. HIXON, UNITED STATES MARSHAL, SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,

and

MANUEL ARISTEGUIETA, CONSUL GENERAL OF THE REPUBLIC OF VENEZUELA, MIAMI, FLORIDA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITIONER'S REPLY MEMORANDUM

The respondents' Briefs in Opposition serve to underscore the importance of the questions presented in the Petition and to augment the appropriateness of review by this Court. The United States, by its assump-

tions and concessions, and the respondent Aristeguieta, by devoting most of his 61 pages to the merits, demonstrate the substantiality of, though not the solutions to, these questions. The widely divergent approach and viewpoints of the two respondents illustrate the need for a definitive resolution of the matters at issue.

Without attempting to cross-examine the manifold contentions of the respondents, petitioner submits this reply memorandum merely to highlight the relevant certiorari considerations apparent from the Briefs in Opposition.

1. Petitioner Has Standing to Raise the Constitutional Issue

The annoyance expressed by the United States (Brief in Opp., pp. 6-7) with petitioner's attempt "to agitate broad questions respecting the constitutional boundaries of the judicial power" has been rendered irrelevant by Mr. Justice Holmes in *Reid* v. *United States*, 211 U.S. 529, 539:

> "We observe that the plaintiff in error gives a hint of dissatisfaction with the Government for raising this point. But jurisdiction is not a matter of sympathy or favor. The courts are bound to take notice of the limits of their authority, and it is no part of the defendant's duty to help in obtaining an unauthorized judgment by surprise."

Indeed, the very fact that the Court of Appeals *sua sponte* raised and decided this constitutional-jurisdictional issue moots any possible complaint about the belatedness of the constitutional challenge. The court was there exercising its duty "of its own motion to inquire into the matter, irrespective of the wishes of the parties." *Minnesota* v. *Hitchcock*, 185 U.S. 373,

382. That issue cannot now be avoided; nor can petitioner be faulted for pursuing it before this Court.[1]

Particularly is it appropriate for this Court to consider a constitutional issue, though briefed for the first time in this Court, that relates to "the proper administration of judicial business" and to "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers," *Glidden Company* v. *Zdanok*, 370 U.S. 530, 536. As stated by Mr. Justice Frankfurter in his dissent in *Lurk* v. *United States*, 366 U.S. 712, 713, "the constitutional history and the cases upon which the decision ultimately must turn are the special concern of this Court." And now that such a constitutional query has been raised by the court below, a "litigious cloud" (*id.*) hangs over the constitutional capacity of federal judges to participate in § 3184 extradition proceedings, a cloud that can be removed only by this Court.

The force of these considerations is not dissipated by the suggestion that petitioner was not hurt by the participation of an Article III judge in these proceedings[2] or by any assertion that he got "*more* than his constitutional due" (Brief of United States in Opp., p. 6, n. 5). Petitioner here is as entitled as the peti-

[1] See *McGrath* v. *Kristensen*, 340 U.S. 162, 167, where this Court said: "The Government properly presents for our consideration an issue of federal jurisdiction not heretofore raised. The *quaere* is whether this proceeding involves a justiciable question under Article III of the Constitution."

[2] The extremely circumscribed judicial nature of a § 3184 proceeding and the necessity in such cases as this of considering and resolving political issues cast some doubt on the easy assumption that an Article III judge is really the best equipped to preside in such a case.

tioners in *Glidden* and *Lark* to insist upon compliance with the commands and limitations of Article III in a proceeding to which he is a party. Article III, said Mr. Justice Harlan in *Glidden*, 370 U.S. at 533, "is explicit and gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record." Petitioner, in short, is entitled to insist upon an extradition proceeding conducted in accordance with the basic law of this land, including the historic constitutional doctrine of separation of powers.

2. The Grant of Certiorari Is Justified by the Absence of Any Decision of This Court During the Last Century Which Considers Extradition Proceedings in Light of Developments in the Interpretation of Article III

As the court below correctly noted (Pet. App., p. 10a), in no previous case has the question been raised—or decided—as to the constitutional capacity of an Article III judge to perform the advisory functions of § 3184. Since the enactment in 1848 of the progenitor of § 3184, approximately 25 extradition cases have come before this Court on their merits; of that number only 4 have involved § 3184 proceedings before federal judges.[3] And in none of those 4 cases was any question raised as to the power of the judges to participate in light of Article III.[4] In such circumstances, of course,

[3] A complete list of extradition cases before this Court on the merits appears in the Appendix hereto. Of these 25 cases, 18 arose before United States Commissioners, 4 before federal judges and 2 before state court judges. One additional case (*In re Metzger*, 5 How. (46 U.S.) 176) started before a federal judge prior to the enactment of what is now § 3184.

[4] The 4 cases are *Fernandez* v. *Phillips*, 268 U.S. 311; *Lincoln* v. *Power*, 241 U.S. 651; *Neely* v. *Henkel*, 180 U.S. 109; and one case before this Court three times, *Collins* v. *Miller*, 252 U.S. 364, *Collins* v. *Loisel*, 259 U.S. 309, and *Collins* v. *Loisel*, 262 U.S. 426.

these 4 cases stand as no precedent or authority on the constitutional question. See *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 38, and cases cited.

On the contrary, the relatively few cases originating before federal judges may well reflect a wide-spread recognition of the undesirability of utilizing the federal judiciary for nonjudicial functions.[5] Be that as it may, the important point is that no decision of this Court has involved the validity of a federal judge's participation in a § 3184 proceeding. *In re Metzger*, 5 How. (46 U.S.) 176, arose prior to the enactment of what is now § 3184. *In re Kaine*, 14 How. (55 U.S.) 103, involved a United States Commissioner, not a District Court Judge. To the extent that this Court has considered other types of treaty proceedings, resulting in determinations reviewable and reversible by an executive officer, it has uniformly denominated them nonjudicial "in the sense in which judicial power is granted by the Constitution to the courts of the United States." *United States* v. *Ferreira*, 13 How. (54 U.S.) 40, 48; and see *Hayburn's Case*, 2 Dall. 409. And two Attorneys General have applied this same description to extradition proceedings of the instant nature, labelling them outside the scope of Article III judicial power. 4 Op. Att'y. Gen. 201, 210-211; 6 Op. Att'y. Gen. 91, 96.

Neither respondent really challenges the non-Article III nature of the § 3184 procedure. The United States

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[5] Contrary to respondent Aristeguieta's assertion (Brief in Opp., p. 60), Venezuela through its competent American counsel made a conscious choice, selecting the District Court rather than a commissioner or state court judge as the forum for the § 3184 proceeding. The United States was not involved in that proceeding or in the choice that Venezuela made.

frankly assumes (Brief in Opp., p. 7) that the District Judge was here "acting as a mere administrative magistrate" and that "the court itself could not have adjudicated the matter." The respondent Aristeguieta is more ambivalent, asserting now (Brief in Opp., p. 15) that the § 3184 power "has traditionally been regarded as a part of or an incident to the judicial power defined in Article III," although he had earlier advised this Court (Pet. for Cert., pp. 20, 24, No. 1, October Term 1962) that the extradition judge is a "special legislative tribunal" that need not operate "within the strict scope of Article III of the Constitution."

Thus is brought into sharp focus the need for determining whether the metaphysical distinction between a court and a judge can justify the exercise of non-Article III judicial power by an Article III judge, a distinction whose speciousness is particularly evident in this case from the complete commingling of the court-judge concepts in the § 3184 proceeding.[6] The appropriateness of review by this Court is heightened by the fact that the *Metzger* and *Kaine* decisions, so heavily relied upon by both respondents, were rendered long before the modern development of the Article III limitations on the exercise of judicial power. Beginning with *Muskrat* v. *United States*, 219 U.S. 346, a landmark decision significantly ignored by both re-

[6] The reliance of the United States (Brief in Opp., p. 9) on the statement in *Todd* v. *United States*, 158 U.S. 278, 284, that a "court is not a judge, nor a judge a court" is misplaced when applied to a proceeding where all distinctions between court and judge were ignored. See Petition, pp. 36-41. The *Todd* case, moreover, did not involve an extradition proceeding. More importantly, the distinction between court and judge loses all meaning if effect is to be given to the strict commands of Article III. See Petition, pp. 30-36.

spondents, and continuing through *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, and *Gliddén Company* v. *Zdanok*, 370 U.S. 530, this Court has drawn from Article III limitations upon judicial power which were merely incipient at the time of the *Metzger* and *Kaine* decisions more than a century ago. A consideration of the impact of those limitations on §3184 proceedings is long overdue.

3. The Attempted Analogy to Ordinary Commitment Proceedings Neither Answers the Constitutional-Question Nor Negatives the Need for Review

Both respondents rely upon what the United States calls (Brief in Opp., p. 11) "the undisputed competence of Article III judges to act as committing magistrates in domestic cases" to substantiate the judicial participation in §3184 proceedings. While this Court has on occasion noted the seeming similarity between the two commitment procedures, it has never had occasion to contrast them *in the light of the limitations of Article III*. When that is done, the analogy breaks down completely.

The undeniable fact is that the ordinary commitment procedure before a federal judge or court relates to "matters of which it has the final decision under the law."[7] But a §3184 proceeding relates to a matter over which the judge or court does not have "the final decision under the law." The certification that issues

[7] *Collins* v. *Miller*, 252 U.S. 364, 369. In using this language, Mr. Justice Brandeis was speaking of habeas corpus proceedings; habeas corpus, of course, is a matter over which the court has final decision under the law and cannot be analogized to an extradition matter, the final decision of which is committed to the Secretary of State. So, too, a commitment on a charge of violating federal law relates to a criminal matter over which the court has the final decision.

is reviewable and reversible by the Secretary of State, an officer of the Executive Department.

So complete is the revisory jurisdiction of the Secretary of State that he considers himself to be, "in effect, . . . an appellate court."[8] When proceedings are certified to him from the committing magistrate, they come to him "upon a *quasi certiorari*," his review extending "to a review of every question therein presented."[9] He may reverse, remand, approve or amend the magistrate's findings and conclusions in any way he sees fit, and "he may differ from the committing magistrate as to the weight or sufficiency of the evidence to support the charges."[10]

Thus the Secretary of State could, under this broad review power, reverse the magistrate's finding in this case that there was insufficient evidence to support the murder charges against petitioner.[11] *But* "[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government." *Chicago & South-*

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[8] Memorandum of Office of the Solicitor for the Dept. of State, June 22, 1921, quoted in IV Hackworth, Digest of International Law 153 (1942).

[9] Opinion of Solicitor General Phillips to Secretary of State, 17 Op. Att'y. Gen. 184, 185 (1881). The opinion further states (p. 186): "Upon the *requisition* being made for extradition, *the whole matter* comes before the Secretary."

[10] Memorandum of Counselor Anderson to Secretary of State Knox, Feb. 5, 1912, quoted in IV Hackworth, Digest of International Law 174 (1942). Moreover, the Secretary is said to have the right to consider any judgment of a habeas corpus court as "gratuitous and impertinent." *Id.*, 173.

[11] The contrary assertion by the respondent Aristeguieta (Brief in Opp., p. 29) is unsupported by any authority to contradict the foregoing opinion and memoranda.

ern Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103, 113. Therein lies the fatal constitutional defect of § 3184, the defect that should command the most serious consideration of this Court.

4. The Absence of an Applicable Definition of a Political Offense Justifies Review for the Purpose of Formulating Such a Definition

The respondents seek to avoid the formulation of a relevant definition of a political offense, for purposes of Article III of the Treaty of Extradition between Venezuela and the United States, by misstating petitioner's contentions. Petitioner does not contend that the financial crimes alleged against him are political in nature simply because he is a former head of state or because there is political enmity between him and those presently in power in Venezuela.

What petitioner does claim is that the time has arrived for a delineation of the political crime concept for use in such a proceeding as the instant one, a delineation that will be meaningful in light of the complex political background and turmoil here evident. Just as it is inadequate merely to say that petitioner is a former head of state and hence immune from extradition, so is it inadequate merely to say that he committed a common crime to his financial enrichment and hence must be extradited.

In light of this Court's admonition that an extradition treaty should not be the pretext for "wreaking individual malice, or forcing the surrender of political offenders," *Grin* v. *Shine*, 187 U.S. 181, 185,[12] peti-

[12] But cf. United States Brief in Opp., p. 13: "Whether the demanding government is moved by a concern for justice, by political considerations or by vindictiveness is not a justiciable issue."

tioner suggests that the entire political mosaic in Venezuela should have been examined by the extradition magistrate, that all elements of the governmental operations involved in the alleged financial crimes stemming from "abuse" of his high office should have been considered, and that all the political turmoil, enmity, violence and upheaval in Venezuela should have been considered in arriving at any fair determination of the political nature of these charges. Such is precisely the kind of investigation made by the extradition magistrate in *In re Mylonas*, 187 F. Supp. 716 (N.D. Ala.), causing him to conclude that the charge of embezzlement (to the defendant's personal enrichment) was "incidental to, formed a part, and was the aftermath of political disturbances [in Greece], and accordingly 'of a political character' of the nature proscribed by the Treaty." Such is the kind of investigation that should have been made in this case.

The United States concedes (Brief in Opp., p. 13) that the situation might be different in its view if there were some allegation that the crimes "were committed at a time of political upheaval and the funds were used to further a political objective." But such is precisely among the allegations made in this case. Petitioner does maintain that these "crimes" occurred during a time of political upheaval and turmoil in Venezuela. And he does maintain that the funds were used for political purposes. Time and again petitioner made the latter allegation before the committing magistrate (Tr. 3138-3150), only to be precluded from offering any testimony or proof thereof (Tr. 3150).

What is needed, therefore, is a meaningful guideline for the magistrate to follow in assessing the political characteristics of these charges.

5. The Procedural Issues Stem Largely From the Confusion as to the Constitutional Capacity of an Article III Judge to Participate in a § 3184 Proceeding and Underline the Need for Resolving That Confusion

The uncertainty surrounding the power of a federal judge to preside over a § 3184 proceeding is dramatically reflected by the procedural morass into which this case fell in the District Court. The subpoena problems stemming from this proceeding, now the subject of Nos. 1 and 4 before this Court, are the direct result of the confusion over the nature of a § 3184 proceeding and the powers of a federal judge in relation thereto. So also, the problems as to Judge Mathes' participation are inextricably entwined with this basic jurisdictional problem.

Thus, in seeking to sustain Judge Mathes' power to participate in the § 3184 proceeding in the light of Article III, the United States (Brief in Opp., p. 7) refers to him "as a mere administrative magistrate." If that be true, how could his jurisdiction to continue herein be affected by the end of his assignment as an Article III district judge? How could it be the business of the Judicial Council for the Fifth Circuit to seek to relieve "a mere administrative magistrate" of his duties in a § 3184 proceeding, duties which the Government assumes (Brief in Opp., p. 7) could not be performed by an Article III court? The problems of Judge Mathes' powers and tenure "as a mere administrative magistrate" are not answered by describing him as a *de facto* or *de jure* judge.

All of this reemphasizes the incongruity of any distinction between a court and a judge in these circumstances. To recognize that incongruity, to hold that the advisory function of an extradition magistrate is

none of the constitutional business of federal courts and judges, is to eliminate the procedural infirmities which have grown around the maintenance of the court-judge fiction in this case.

One final word need be said about the respondents' reliance on Judge Whitehurst's certificate to the effect that it was reached "upon consideration of all the evidence submitted." Tr. 4316. It is undenied that Judge Whitehurst impeached his own certificate by admitting that he had not read all the evidence. Moreover, the certificate itself was prepared and submitted to Judge Whitehurst by counsel for the demanding government. Tr. 4254, 4256, 4265, 4284, 4311-4312.[13] Under these circumstances, nothing in *United States* v. *Morgan*, 313 U.S. 409, requires acceptance of the certification at its face value and denial of petitioner's right to a decision based on a reading of all the evidence.

CONCLUSION

For these reasons, supplementing those in the Petition, the writ of certiorari should issue.

Respectfully submitted.

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May 3, 1963.

[13] A reading of the entire conference before Judge Whitehurst on June 23, 1961 (Tr. 4262-4313), reveals the prejudice to petitioner resulting from the failure to read all the evidence. See, e.g., Tr. 4296-4297.

APPENDIX

Extradition Cases Before This Court on the Merits

A. Cases in which § 3184 proceedings originated before U. S. Commissioner:

1. In re Kaine, 14 How. (55 U.S.) 103.
2. Benson v. McMahon, 127 U.S. 457.
3. In re Oteiza y Cortes, 136 U.S. 330.
4. Ornelez v. Ruiz, 161 U.S. 502.
5. Bryant v. United States, 167 U.S. 104.
6. Rice v. Ames, 180 U.S. 371.
7. Terlinden v. Ames, 184 U.S. 270.
8. Grin v. Shine, 187 U.S. 181.
9. Wright v. Henkel, 190 U.S. 40.
10. Pettit v. Walshe, 194 U.S. 205.
11. Yordi v. Nolte, 215 U.S. 227.
12. Glucksman v. Henkel, 221 U.S. 508.
13. McNamara v. Henkel, 226 U.S. 520.
14. Kelly v. Griffin, 241 U.S. 6.
15. Bingham v. Bradley, 241 U.S. 511.
16. Factor v. Laubenheimer, 290 U.S. 276.
17. Volentine v. United States, 299 U.S. 5.
18. Karadzole v. Artukovic, 355 U.S. 393.

B. Cases in which § 3184 proceedings originated before U. S. District Court Judges:

1. In re Metzger, 5 How. (46 U.S.) 176 (an analogous proceeding under a treaty prior to enactment of § 3184).
2. Neely v. Henkel, 180 U.S. 109.
3. Lincoln v. Power, 241 U.S. 651.
4. Collins v. Miller, 252 U.S. 364.
   Collins v. Loisel, 259 U.S. 309.
   Collins v. Loisel, 262 U.S. 426.
   } All one case.
5. Fernandez v. Phillips, 268 U.S. 311.

C. Cases in which § 3184 proceedings originated before state court judge:

1. Elias v. Ramirez, 215 U.S. 398.
2. Charlton v. Kelly, 229 U.S. 447.

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No. 968

In the Supreme Court of the United States

October Term, 1962

Maurice Power Stanley, petitioner

v.

Cyrus W. Hansen, United States Marshal, Southern District of Florida, Miami Division, and Marvin Andrews, Consul General of the Republic of Venezuela, Miami, Florida

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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LOUIS F. OBERDORFER,
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Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 958

MARCOS PEREZ JIMENEZ, PETITIONER

v.

GUY W. HIXON, UNITED STATES MARSHAL, SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, AND MANUEL ARISTEGUIETA, CONSUL GENERAL OF THE REPUBLIC OF VENEZUELA, MIAMI, FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

We address ourselves only to the surprising statement in petitioner's reply memorandum (p. 8) that "... the Secretary of State could, under [his] broad review power, reverse the magistrate's finding in this case that there was insufficient evidence to support the murder charges against petitioner." There is no basis whatever for the contention. Nor has the Secretary of State ever claimed such power.

Nothing in petitioner's authorities supports his statement. The three opinions cited in the memoran-

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dum (p. 8, notes 8–10) go only to the question whether the Secretary may re-evaluate the evidence which the committing magistrate has found *sufficient*. Thus, Solicitor General Phillips concluded that such a re-examination "gives to the party charged the double protection of a concurrence of views upon all questions affecting his guilt under the treaty by the magistrate and the Secretary before he is to be surrendered." 17 Op. Att'y Gen. 184, 187. No one, to our knowledge, has ever suggested the contrary—that the Secretary may hold sufficient the evidence which the magistrate has found inadequate. Indeed, the relevant statutes make it clear that this is not the case. The Secretary of State may surrender only a "person committed under sections 3184 or 3185 of [Title 18]," 18 U.S.C. 3186, and committal under section 3184 occurs only if the magistrate "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention." 18 U.S.C. 3184. While there has been some debate as to the Secretary's freedom to disregard the magistrate's finding of probable cause and refuse surrender on the ground of his own dissatisfaction with the evidence, it has been understood from the beginning that the magistrate's finding of insufficient evidence is final and binding on the Executive Department. See 6 Op. Att'y Gen. 91; Spear, *The Law of Extradition* (1879), pp. 214, 220, 223–224; 1 Moore, *A Treatise on Extradition and Interstate*

Rendition (1891), p. 550; Hawley, *The Law and Practice of International Extradition* (1893), pp. 26, 37.

Respectfully submitted,

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May 1963.

Office Supreme Court, U.S.
FILED
MAY 8 1953
JOHN F. DAVIS, CLERK

Supreme Court of the United States

SUPPLEMENTAL MEMORANDUM FOR RESPONDENT
MANUEL ARISTEGUIETA

Supreme Court of the United States

OCTOBER TERM, 1962

No. 958

MARCOS PEREZ JIMENEZ, *Petitioner*,

v.

GUY W. HIXON, United States Marshal, Southern District of Florida,
and
MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Miami, Florida, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR RESPONDENT MANUEL ARISTEGUIETA

Petitioner asserts for the first time in his reply memorandum that "time and again" he alleged before the extradition judge that the funds he is accused of embezzling "were used for political purposes," and that he was "precluded from offering any testimony or proof thereof." (Reply Mem., p. 10).

The statement is so unfounded that it is easy to understand why the point was not urged upon the District Court or the Court of Appeals or made in the petition in this Court.

Petitioner cites pages 3138-50 of the Transcript of Record. At these pages there is recorded a colloquy that followed an objection by counsel for this respondent to a question put by counsel for the petitioner to one of petitioner's witnesses, Dario Parra, a former Venezuelan government official. The witness had been testifying about alleged subversive activities during the time petitioner was in office, in line with petitioner's contention that the murders with which he was charged were connected with political offenses because they were associated with such activities. (Tr. 3109-37). The witness then testified that such subversive activities were especially marked during two periods when there were elections. The latter of the two periods was stated to be November 1957-January 1958; a plebiscite was held in December 1957 and the "Government was overthrown" in January 1958. (Tr. 3138). Then the following question was put to the witness:

> "What parties participated in this activity with reference to the second period that you mentioned?" (*Ibid.*)

At this point counsel for this respondent objected on the ground that alleged subversive activities in the period November 1957-January 1958 were too remote from the time of the murders, the last of which occurred in 1954. (*Ibid.*) Thereupon counsel for the petitioner suggested *for the first and only time* that he desired to elicit testimony that there was a practice, at a time of electoral campaigns, of seeking contributions from government contractors "on behalf of the Government party in power," the Government party being "called F.E.I.," and that this might have some bearing on the alleged embezzlements. (Tr. 3140-41). Counsel for this respondent pointed out that the pending question related to alleged subversive

activities during the November 1957-January 1958 period, which could have nothing to do with the petitioner's embezzlements long prior thereto. (Tr. 3140, 3143). The petitioner's counsel never showed any connection, and the judge sustained the objection to the pending question. (Tr. 3150). Petitioner's counsel dropped the point, and it has never re-emerged until the petitioner's reply memorandum in this Court.

It is apparent that the pending question was utterly irrelevant. As a matter of fact the same witness testified that the F.E.I.—the Government political party referred to by counsel for the petitioner—existed only from late 1951 to mid-1953. (Tr. 3169). Obviously subversive activities—or any activities—more than four years later could have nothing to do with the financing of that party.

It is not difficult to see why the petitioner's counsel dropped the point. He had stated that the question to the witness Parra was to "begin to lay the groundwork" for the evidence of prospective deponents in Europe, and he particularly named General Llovera Paez. (Tr. 3148). But Llovera Paez's affidavit, designed to show in detail and as strongly "as the truth permits" (Tr. 2761-62) what his testimony would be, was received in evidence by stipulation of this respondent (Tr. 4211-12), a course welcomed by the petitioner (Tr. 3400-01; see Tr. 3414-18), and it contained nothing whatsoever remotely bearing on counsel's suggestion as to how the Government party was financed or on any political use of the embezzled funds.[1] Nor did any of the other affidavits from persons in Europe that the petitioner had tendered.

Thus there is not a shadow of merit in this most belated claim that the petitioner was precluded from showing that

[1] General Llovera Paez's affidavit deals mainly with matters pertinent to the murders. (Tr. 4106-17). The portion dealing with financial matters is a mere denial of any financial wrongdoing. (Tr. 4117-18).

the funds from his embezzlements were used for political purposes or that he ever so alleged, much less "time and again."[2]

Respectfully submitted,

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May 1963

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[2] The emptiness of petitioner's claim is further emphasized by his reliance on the "investigation" made by Judge Grooms, sitting as extradition judge in In re Mylonas, 187 F. Supp. 716 (N.D. Ala. 1960). (Reply Mem., p. 10). There Judge Grooms, after noting the political disruption prevailing in Greece at the relevant periods, and testimony that the alleged embezzlements were only "a breach of formality as a result of a political impasse," 187 F. Supp. at 719, n. 7, found on the facts that they constituted the use by the defendant of funds of a local governmental unit "for other and perhaps more urgent projects" than the projects for which they had been authorized, and that governmental authorities had actually "subsequently approved the expenditures." *Id.* at 720. Hence, of course, the wrong, if any, was of a purely political character. But in the petitioner's case all of the tribunals have found that the embezzlements were for the petitioner's own enrichment.

SUPREME COURT, U. S.

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FILED
JUN 7 1963
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 958

MARCOS PEREZ JIMENEZ, *Petitioner,*

v.

GUY W. HIXON, UNITED STATES MARSHAL, SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,

and

MANUEL ARISTEGUIETA, CONSUL GENERAL OF THE REPUBLIC OF VENEZUELA, MIAMI, FLORIDA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR REHEARING

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 958

MARCOS PEREZ JIMENEZ, *Petitioner*,

v.

GUY W. HIXON, UNITED STATES MARSHAL, SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,

and

MANUEL ARISTEGUIETA, CONSUL GENERAL OF THE REPUBLIC OF VENEZUELA, MIAMI, FLORIDA, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

Petitioner respectfully prays that this Court grant rehearing of its order of May 13, 1963, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case as prayed for in the petition filed herein on March 28, 1963.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Subsequent to the denial of certiorari in this case, Judge Tyler of the United States District Court for the Southern District of New York on May 23, 1963, issued an opinion in an extradition proceeding under 18 U.S.C. §3184, entitled *In the Matter of Clodovco Ortiz Gonzalez*. That opinion, which is non-appealable under §3184, serves to emphasize the critical importance of the constitutional issue at stake in the instant case and to express an approach to the "political offense" concept in direct conflict with that adopted by the court below. A copy of Judge Tyler's opinion is appended hereto, p. 10, *infra*.

A. The Constitutional Issue

The *Ortiz* opinion of Judge Tyler, like the certification of Judge Whitehurst in the instant case (Pet. App. C., pp. 34a-39a), is a classic example of an advisory opinion that is reviewable and reversible by the Secretary of State. In neither case is the Secretary bound to accept the findings or determinations of the committing magistrate. Article III of the Constitution, as interpreted by this Court, flatly prohibits the rendition of such an advisory opinion by a District Court or a District Judge.

These two cases illustrate two of the advisory features of the §3184 procedure, features which add to the nonjudicial, non-Article III nature of that procedure:

(1) The *Ortiz* case demonstrates that even a ruling by a magistrate that no extraditable offense has been shown, or that the offense is political and hence non-

extraditable, can be certified to and reviewed by the Secretary of State. The technique there revealed, following just such a holding by a United States Commissioner, was to reinstitute the extradition matter before a District Judge on precisely the same grounds and to insert the record of the hearings before the Commissioner into the record before the District Judge. See footnote 6, p. 12, *infra*. The District Judge, differing with the Commissioner as to the political nature of the offense, then certified the entire record to the Secretary of State, enabling the latter to review and disagree either with the Commissioner's determination on the evidence before him or with the District Judge's determination.

(2) The instant case presents the unusual feature of the extradition magistrate having found certain claims (the murder charges) inadequately proved and other claims (the financial crime charges) both proved and of a non-political nature. He therefore certified the *entire* record and *all* his findings to the Secretary of State. The latter thereby became empowered to review "every question therein presented"[1] and to "differ from the committing magistrate as to the weight or sufficiency of the evidence to support the charge"[2]—*including the murder charges*.

The contrary position of the United States that the Secretary may not hold sufficient the evidence which the magistrate has found inadequate is not borne out by the authorities cited in its supplemental memo-

[1] Opinion of Solicitor General Phillips to Secretary of State, 17 Op. Att'y Gen. 184, 185 (1881).

[2] Memorandum of Counselor Anderson to Secretary of State Knox, Feb. 5, 1912, quoted in IV Hackworth, Digest of International Law 174 (1942).

randum to this Court. All of the cited authorities[3] deal only with the simple and ordinary situation where the magistrate has found the entire evidence inadequate and consequently has freed the defendant without certifying any record or findings to the Secretary of State.[4] Not one of these authorities mentions the instant situation where the findings as to inadequate proof do not lead to the discharge of the defendant but are certified to the Secretary along with findings as to adequate proof of other charges.

In that situation, the general rule announced and applied by the Secretary would appear applicable—i.e., in the words of Solicitor General Phillips, "Upon the *requisition* being made for extradition, *the whole matter* comes before the Secretary . . . [with] a *power* to review the whole matter." 17 Op. Att'y Gen. 184, 186 (emphasis in original).[5] In short, the certification under §3184 of the findings and testimony is what opens the door to plenary review by the Secretary of

[3] 6 Op. Att'y Gen. 91; Spear, The Law of Extradition (1879), pp. 214, 220, 223-224; 1 Moore, A Treatise on Extradition and Interstate Rendition (1891) p. 550; Hawley, The Law and Practice of International Extradition (1893), pp. 26, 37.

[4] As stated in one of the cited authorities, 1 Moore, A Treatise on Extradition and Interstate Rendition (1891), p. 550, "judicial magistrates have power to discharge the fugitive, and thus to leave the executive without authority to surrender him; while, if they hold that he should be extradited and commit him for that purpose, the executive is not bound to accept their conclusion."

[5] One of the other authorities cited by the Government states that "The executive function of delivery, after the judicial action, with all the testimony connected therewith, has been certified to the Secretary of State, carries with it the power of reviewing all the proceedings and passing judgment upon their correctness." Spear, The Law of Extradition (1879), p. 223.

State. And nothing in the statute limits him to a review only of those findings adverse to the defendant.[6]

Thus the revisory power of the executive over the findings and conclusions of the committing magistrate seems complete and unqualified. The function of the magistrate thereby becomes advisory—a function which an Article III court or an Article III judge cannot exercise. It is this advisory function that has led at least three Attorneys General to rule that though the action of the judge "be in form and effect judicial, it is yet not an exercise of any part of what is technically considered the judicial power of the United States."[7] That conclusion, fully borne out by the proceedings in the *Ortiz* and the instant cases, calls for plenary consideration of the problem by this Court.

B. The "Political Offense" Issue

The decision of Judge Tyler in the *Ortiz* case expresses the critical and highly relevant truth that "a chief reason for the presence of the 'political offense' exception in our extradition treaties is to prevent our legal processes from being used by a foreign regime as instruments of reprisal against its domestic political opponents." See p. 16, *infra*. The opinion makes

[6] Moore has stated that the executive has no authority to surrender a fugitive "upon any charge other than one which has been heard before a magistrate and certified by him to be sustained by the evidence." IV Moore, Digest of International Law (1906), p. 400. But a later authority has refused to make so absolute a statement, stating merely that "It is believed" that the Secretary can surrender only on charges certified to be sustained by the evidence. 2 Hyde, International Law (2d rev. ed. 1945), p. 1060. No statutory or judicial authority can be found to support Moore's statement.

[7] The quoted words are those of interim Attorney General Coffey in 1863 (10 Op. Att'y Gen. 501, 506). Similar statements by Attorney General Nelson in 1843 (4 Op. Att'y Gen. 201, 210-211) and by Attorney General Cushing in 1853 (6 Op. Att'y Gen. 91, 96) are quoted in the Petition, pp. 29-30.

further note of the fact that "where one foreign regime seeks the extradition of an individual for acts done as an official of a prior regime" a situation arises "where this danger is acutely present." See p. 16, *infra*.[8] In the instant proceeding, however, neither the court below nor the committing magistrate exhibited any such realization of the purpose and thrust of the "political offense" concept.

Judge Tyler thereby reflected the admonition of this Court in *Grin* v. *Shine*, 187 U.S. 181, 185, that "Care should doubtless be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice, or forcing the surrender of political offenders." But he declined to assume such responsibility, preferring to leave the matter to the Secretary of State.

The problems raised by *Ortiz* and by the instant case are whether the inquiry into such an abuse of our legal processes is to be made by the extradition judge or the Secretary of State and, if it is to be made by the judge, what standards of inquiry are to be followed. The instant case presents these problems in their most aggravated and acute form, for here the effort is directed toward the extradition of a former head of state by his domestic political opponents. Such an effort is "wholly unexampled in the annals of United States diplomacy."[9]

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[8] "... it must be emphasized that the whole basis of the [political offense] concept is that the offender is wanted for actions taken by him against the government seeking to punish him." Green, *Political Offences, War Crimes and Extradition*, 11 Int. and Comp. Law Quart. 329, 330 (1962).

[9] "To extradite a former head of state of a foreign nation solely for alleged abuses of his powers during his tenure, would be wholly unexampled in the annals of United States diplomacy. This is especially true because extradition is sought by a regime which replaced the Jimenez rule in 1957; moreover, incumbent President Betancourt of Venezuela had been a member of the government

While the motivation of the foreign government in seeking extradition is not a proper subject of judicial inquiry, the concept of a "political offense" in the setting of an effort to extradite a former head of state for abuses of his official duties is one that should be and must be examined in the course of a §3184 proceeding. Judicial tribunals of other nations, faced with efforts to extradite for analogous politically-related crimes, have faced up to the problem in the context of applying the political offense exception.[10] American tribunals, to the extent they are constitutionally authorized to act, should do no less. The Secretary of State, apparently feeling himself bound by the record before the magistrate, gives no additional opportunity to the defendant to develop all the facts necessary to show the true political nature of the offense. See IV Hackworth, Digest of International Law 173-174 (1942).[11] It thus becomes essential to

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which was replaced in 1948 by a group of which General Jimenez was a leading figure." Letter dated May 27, 1963, to Secretary of State Rusk from John de J. Pemberton, Jr., Executive Director of the American Civil Liberties Union, protesting petitioner's extradition and urging that he be granted political asylum in the United States.

[10] Thus the Swiss federal tribunal has held the act of stealing money from the public treasury for the sole purpose of aiding a revolutionary party to gain control of the government to be a common crime directly connected with a political crime and hence no basis for extradition. Case of Keressilidze and Magaloff, Feb 12, 1907, noted in Deere, *Political Offenses in the Law and Practice of Extradition*, 27 Am. J. of Int. Law 247, 248 n. 10 (1933).

[11] Hackworth quotes the following from a memorandum prepared by the Counselor of the Department of State in 1912 for the use of the Secretary: "It has been customary for the Secretary to confine himself to the facts of the case presented in the record which has been certified up to him by the committing magistrate. On this principle the Department has consistently refused to consider additional facts not appearing in the record whether presented to the Department on the part of the requesting government, or on behalf of the fugitive criminal."

permit the development of the pertinent facts before the magistrate and to secure his considered judgment thereon. Otherwise the important "political offense" exception in our extradition treaties becomes a dead letter.

Therefore, proper standards for the magistrate to follow in formulating and evaluating the "political offense" concept must be laid down. And those standards must be crystallized against the backdrop of the main purpose of the "political offense" concept—a concept designed to preclude extradition by one's domestic political opponents for alleged crimes involving the political organism or sovereignty of the demanding government. To leave the problem solely in the hands of the Secretary of State, as Judge Tyler did, is to abdicate a necessary function of the magistrate and to augment his subservience to the executive.

This problem is accentuated in the instant case by the magistrate's action in cutting off petitioner's efforts to develop the full record necessary to a fair evaluation of the "political offense" claim, once that concept be properly defined.

The *Ortiz* opinion highlights the need for viewing the "political offense" concept in terms of its major political purpose and then applying it to the kind of political situation here present. Certiorari should therefore be granted so that the basic principles can be defined.

CONCLUSION

For these reasons, supplementing those in the Petition, the order denying certiorari should be reheard and vacated, and the writ of certiorari should issue to review the judgment below.

Respectfully submitted,

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June 7, 1963

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

EUGENE GRESSMAN

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M18-65

In the Matter of the Extradition of

CLODOVEO ORTIZ GONZALEZ,

A Fugitive from the Justice of the Dominican Republic.

Opinion

ROBERT M. MORGENTHAU, United States Attorney for the Southern District of New York by
PETER K. LEISURE, Assistant United States Attorney, and
ERIC J. BYRNE, Attorney, Department of Justice, Washington, D. C.

BERTRAND D. GERBER, ESQ., and
EDWARD CHERNEY, ESQ., of New York, N. Y.,
Attorneys for Respondent.

TYLER, D.J.

Under procedures set forth in 18 U.S.C. 3184 (9 Stat. 302 (1848)) the United States Attorney here proceeds on behalf of the Dominican Republic in seeking the extradition from this country of Clodoveo Ortiz Gonzalez ("Ortiz"), a national of the Dominican Republic.

The demand for extradition is made under the terms of a Convention entered into between the United States and the Dominican Republic, proclaimed on August 26, 1910, which provides for the extradition, to the demanding state, of any person "who may be charged with, or may have been convicted of any of the [following] crimes[:] . . . murder . . .".

On March 6, 1962, a "warrant of provisional arrest" was issued by the Dominican authorities against Ortiz. In an accompanying "Summary Judicial Certification", it is stated:

"In accordance with the depositions made before this Judge on January 31 . . . 1962 . . . the criminal liability of the accused . . . has been fully established[:] . . . Clodoveo Ortiz Gonzalez did, by means of torture in the house of detention named "the 40", kill the persons named . . . Deschamps . . . and . . . Espertin-Oliva . . . on August 12 . . . (1960), as is attested by the eyewitnesses . . . Tineo and . . . Saavedra."

The affidavits of Tineo and Saavedra amply support the conclusion that Ortiz was one of those who, acting in a military or quasi-military capacity under the regime of Generalissimo Rafael Trujillo,[1] did actively participate in the torturing and killing of the two named prisoners.

The burden of proof which must be met in order that certification of an "extraditable offense" be made by this court under 18 U.S.C. 3184 is that the case be proved with the degree of sufficiency necessary to justify commitment for trial under local law.[2] On the record before me, this burden has been met with respect to the crime of murder charged here.[3]

There remain, however, two issues of law.

The treaty applicable here, in common with most treaties of extradition, contains a provision excluding extradition

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[1] Generalissimo Trujillo was assassinated in May, 1961.

[2] *Collins* v. *Loisel*, 259 U.S. 309, 315-316 (1922); *United States* v. *Stockinger*, 269 F. 2d 681, 684 (2d Cir. 1959) (". . . reasonable ground . . .").

[3] The law to be applied is both the local law and the law of the demanding state; that is, the crime must be made out under both legal systems. *Petit* v. *Walshe*, 194 U.S. 205, 217-218 (1904). The United States-Dominican Republic Convention of Extradition, Article I.

"for any crime or offense of a political character . . . [and] . . . acts connected with such crimes or offenses".[4]

Ortiz bases his opposition to the certification of extraditable offense here sought chiefly on the argument that the crime charged falls within this "political offense" exception.

On March 7th, 1963, a United States Commissioner in this District denied extradition of Ortiz for the very crimes charged here, on the grounds that, though amply proved, they were political offenses and as such not cause for extradition. This determination is not finally binding in later, renewed, proceedings.[5] I am constrained to hold that, on the facts disclosed by the record before me, the political offense exception does not apply.[6]

The conception of "political offense", in the context of extradition, is a familiar one.[7]

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[4] See, Research in International Law, *Extradition*, 29 American Journal of International Law (1935) (Supplement) 108-109. There are two, closely related, reasons for the political offense rule. (1) To the extent that an act is "politically" motivated, there may be lacking the *scienter*, or other elements, present in common criminal conduct. Hyde, 1 *International Law* 572 (1922); *In re Castioni*, 1 Q.B. 149, 165-167 (1890). (2) It might be feared that the demanding government will deal arbitrarily and summarily with its political enemies. Hyde, *op. cit.*, p. 572; English Extradition Act, 33 and 34 Vict. c. 52 § 3 (1870) ("A fugitive criminal shall not be surrendered if the offense . . . is one of a political character or if . . . the requisition for his surrender has in fact been made with a view to try to punish him for an offense of a political character."); *Cf.*, Research in International Law, *Extradition*, *supra*, at p. 22 (draft extradition convention § 5(a)).

[5] *United States* v. *Levy*, 268 U.S. 390 (1925); *Collins* v. *Loisel*, 262 U.S. 426 (1923).

[6] By stipulation of the parties, the record of the hearings before the United States Commissioner have been made part of the record before this court.

[7] Footnote four, *supra*.

Both the English and American cases dealing with this issue recognize the leading case to be *In re Castioni*, 1 Q.B. 149 (1891).

That was a case of first impression in England, applying for the first time the "political offense" exception contained in the applicable extradition statute, 33 and 34 Vict. c. 52 (1870). In that case, the Swiss government sought the extradition of one Castioni for a fatal shooting done by him while he was participating in a violent popular demonstration protesting the government's refusal to submit a proposed constitutional revision to popular vote.

The Queens Bench Division held that extradition for this crime was barred since it was a "political offense".

There are three concurring opinions in *Castioni* which discuss the "political offense" concept at some length. However, they are fairly summarized by the much-quoted definition, set forth by Hawkins, J., according to which those offenses are political which "were incidental to and formed a part of political disturbances." *In re Castioni*, 1 Q.B. at p. 166.

Authorities on international law restate the prevailing Anglo-American law in essentially this form.[8]

A leading American case in this area establishes that the political offense exception is applicable to acts of government agents seeking to suppress an uprising, as well as to the acts of those participating in the uprising. *In re Ezeta*, 62 Fed. 972, 1002 (N.D. Calif. 1894). See also, *Karadzole v. Artukovic*, 247 F. 2d 198 (9th Cir. 1957), *rev'd on other grounds*, 355 U.S. 393 (1958).

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[8] Hyde, *op. cit.*, p. 573; Garcia-Mora, "The Nature of Political Offenses", 48 Va. L. Rev. 1226, 1240 ff. (1962); Deere, "Political Offenses in the Law and Practice of Extradition", 27 American Journal of International Law 247, 266 (1933).

In either event, however, the general rule is that there must be an "uprising", and that the acts in question must be incidental to it.[9]

A hearing was conducted before this court on March 27, 1963,[10] to determine whether in August, 1960, there was

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[9] Notwithstanding the validity of this general proposition of law, it must be emphasized that the "political offense" concept is essentially a flexible one. Judge Denman, in *In re Castioni*, 1 Q.B. 149, 155 (1891), stated: "I do not think it is necessary or desirable that we should attempt to put into language in the shape of an exhaustive definition exactly . . . every state of things which might bring a particular case within the description of an offense of a political character." This in a sense presaged a recent holding of the same court, *Ex parte Kolczynski*, 1 Q.B. 540 (1955), that mutiny by the crew of a small Polish fishing trawler was a "political offense", notwithstanding that it was not an incident of a political uprising. This case indicates, first, that at least under English law, there is no absolute requirement that there be a political uprising in order for the political offense exception to be applicable; but that the only indispensable ingredient is that the acts be politically motivated and directed towards political ends. 1 Q.B. at p. 550. Secondly, *Kolczynski*, as well as the history of the political offense exception in Anglo-American law, arguably indicate that the political offense exception legitimately can be applied with greater liberality where the demanding state is a totalitarian regime seeking the extradition of one who has opposed that regime in the cause of freedom. *Cf.*, Oppenheim, 1 *International Law*, pp. 704-705 (1955); Deere, "Political Offenses in the Law and Practice of Extradition", 27 American Journal of International Law 247, 251 (1933). Indeed, these two factors are closely related: In an effectively repressive totalitarian regime, traditional "political disturbances" or "uprisings" may be unknown despite deep and wide-spread hostility towards the regime. Applying these two factors to the case at bar: (a) The issue whether the acts of Ortiz should be deemed "politically motivated and directed towards political ends" is treated post, pp. 9-10. (b) Nothing in the record before me suggests that the second-named factor is applicable; that is, this does not appear to be a case in which the acts in question were blows struck in the cause of freedom against a repressive totalitarian regime.

[10] On April 3, 1963, a further hearing was held, but on that date no testimony was taken.

such a condition of "uprising" or political disturbance in the Dominican Republic as would justify application of the "political offense" exception to the killings allegedly then committed by Ortiz. The testimony given at that hearing establishes that there was no such disturbed political condition.

Moreover, nothing in the record before me suggests that Ortiz acted with such essentially political motives or political ends as might justify substantial relaxation of the "political disturbance" requirement. (See footnote 9, supra). Indeed, any other conclusion would be contrary to a second contention of Ortiz here, which is that his acts were those of a military subordinate obeying the orders of a superior, and hence were essentially incidents of a system of military discipline.

To the extent that this contention is valid, and I conclude from the record before me that it is largely so, Ortiz' conduct must be regarded as flowing not so much from a personal commitment to a political cause, as from a personal commitment to a system of military discipline. This, in my view, particularly reinforces the conclusion that the "political offense" principle or exception is inapplicable here.[11]

This raises a second issue of law, which is the effect of Ortiz' contention that he acted under the orders of a superior and in the exercise of public authority, and that hence his conduct cannot be deemed criminal.

There is authority for the proposition that "defenses", such as this one, are not to be considered in extradition proceedings but are to be left for the trial court.[12] The

[11] The motive or purpose behind the conduct is a significant factor. *In re Castioni*, 1 Q.B. at pp. 159, 167 (1891); *Ex parte Kolczynski*, 1 Q.B. at p. 550 (1955); Research in International Law, *op. cit.* (draft convention on extradition, § 5(b)) ("... offenses having a political objective ..."); *Cf. Argoud v. Ruiz*, 161 U.S. 502, 512 (1896) ("... political intentions ...").

[12] *In re Ezeta*, 62 Fed. 972, 986 (1894).

thrust of this rule, however, is simply that the extradition court may not attempt to finally resolve issues of fact raised by defenses directed to the merits of the charge. This cannot overturn or impinge upon the rule that the demanding state has the burden of proving the governing law, and of making out its *prima facie* factual case, with respect to any matter which the extradition court deems important, and *bona fide* at issue, bearing on the guilt or innocence of the accused. The criminality *vel non* of these acts of Ortiz, assuming them to have been performed by him as an agent of the Dominican government, is such an issue in this case.

The Dominican Republic has met its burden with respect to this issue. Specifically, I am satisfied that under the Dominican law, as under our own law, public officials may be criminally liable for acts which fall well outside duly constituted public authority,[13] and that there is a *prima facie* case that this rule is applicable to the extraordinary homicidal acts ascribed to Ortiz.

Thus, the requirements set forth in 18 U.S.C. 3184 have been satisfied. One further word, however, may be appropriately added.

As noted above,[14] a chief reason for the presence of the "political offense" exception in our extradition treaties is to prevent our legal processes from being used by a foreign regime as instruments of reprisal against its domestic political opponents.

The state of facts in the case at bar where one foreign regime seeks the extradition of an individual for acts done as an official of a prior regime, presents, at least superficially, a situation where this danger is acutely present.

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[13] Wharton, 1 *Criminal Law & Procedure*, 452 (1957); affidavit of Emil Weinberg, of the Dominican Republic, submitted in these proceedings.

[14] Footnote four, *supra*.

While I have no reason to believe that this danger has materialized in this specific case, I nonetheless fully endorse the following passage from the opinion of the District Court in *In re Lincoln*, 228 Fed. 70, 74 (E.D.N.Y. 1915):

". . . [I]t is not a part of the court proceedings nor of the hearing upon the charge of crime to exercise discretion as to whether the criminal charge is a cloak for political action, nor whether the request is made in good faith. Such matters should be left to the Department of State . . .[5]

"It is thought by the court that application to the Secretary of State of the United States will furnish full protection against the delivery of the accused to any government which will not live up to its treaty obligations, and that the Secretary of State will be fully satisfied (before delivering the accused to the demanding government) that he is wanted (in the legal sense of that term) upon a criminal charge, that it is not sought to secure him from a country upon which he is dependent as an asylum because of political matters, and that the treaty is not actually used as a subterfuge".

In conclusion, it is here determined that the evidence is sufficient to sustain the charge, for which the extradition of Clodoveo Ortiz Gonzalez is sought, under the provisions of the applicable convention. The Clerk is directed, pursuant to the statute, to certify a copy of this opinion and the record in this case, including transcripts of all testimony received, to the Secretary of State of the United States.

So Ordered.

Dated: New York, N. Y.
May 23, 1963.

s/ Harold R. Tyler, Jr.
U.S.D.J.

[5] Ind. cd. 18 U.S.C. 3184 gives this court no authority to inquire into such matters.